DOCKET

No. 08-6925
Title: Curtis Darnell Johnson, Petitioner
v.
United States
Docketed: October 24, 2008
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (07-13497)
Decision Date: May 30, 2008
Rehearing Denied: July 22, 2008
Questions Presented

Date	Proceedings and Orders
Oct 20 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 24, 2008)
Nov 19 2008	Order extending time to file response to petition to and including December 24, 2008.
Dec 24 2008	Brief of respondent United States in opposition filed.
Dec 30 2008	Reply of petitioner Curtis Darnell Johnson filed.
Jan 8 2009	DISTRIBUTED for Conference of January 23, 2009.
Feb 17 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Questions 1 and 2 presented by the petition.
Mar 12 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 26, 2009.
Mar 25 2009	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 27, 2009.
May 27 2009	Brief of petitioner Curtis Darnell Johnson filed.
May 27 2009	Joint appendix filed (Volume 1). Statement of costs received.
May 27 2009	Motion for leave to file Volume II of the joint appendix under seal filed by petitioner Curtis Darnell Johnson.
Jun 2 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 3 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 16 2009	The time within which to file the respondent's brief on the merits is extended to and including July 24, 2009.
Jul 6 2009	The time within which to file respondent's brief on the merits is further extended to and including August 7, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Tuesday, October 6, 2009.
Jul 17 2009	CIRCULATED.
Jul 27 2009	Motion for leave to file Volume II of the joint appendix under seal GRANTED.
Aug 6 2009	Record received from U.S.D.C. for the Middle District of Florida. (1 envelope)
Aug 7 2009	Brief of respondent United States filed. (Distributed)
Sep 8 2009	Reply of petitioner Curtis Darnell Johnson filed. (Distributed)
Sep 11 2009	Record received from United States Court of Appeals for the Eleventh Circuit. (1-envelope - 2 briefs)
Oct 6 2009	Argued. For petitioner: Lisa Call, Assistant Federal Public Defender, Jacksonville, Fla.

For respondent: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

No. 08-6925

IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

ORIGINAL

Supreme Court, U.S.
FILED
OCT 21 2008
OFFICE OF THE CLERK

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

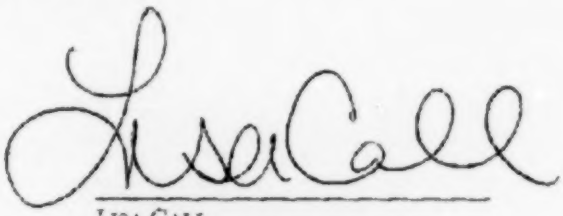
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, **CURTIS DARNELL JOHNSON**, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis in accordance with Supreme Court Rule 39, and 18 U.S.C. § 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida by the United States District Court. In accordance with 18 U.S.C. § 3006A(d)(6), no affidavit as required by Supreme Court Rule 39, need be filed.

OCT 21 2008

WHEREFORE, Petitioner Curtis Darnell Johnson, asks leave to proceed in forma pauperis.

DATED this 20th day of October, 2008.



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BEST AVAILABLE COPY

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

2. Whether this court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" - a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Further, whether this court should resolve a circuit split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

3. Whether the district court lacked the authority to sentence Mr. Johnson as an Armed Career Criminal, given that Mr. Johnson did not admit the predicate offenses for such a classification when he pled guilty.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

CURTIS DARNELL JOHNSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, **CURTIS DARNELL JOHNSON**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on May 30, 2008.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-5a) is reported at 528 F.3d 1318. The Court's order denying rehearing and rehearing *en banc* (App., *infra*, 1b) is unreported.

JURISDICTION

The petitioner, **CURTIS DARNELL JOHNSON**, was prosecuted by a one-count indictment in the United States District Court for the Middle District of Florida, for violation of 18 U.S.C. § 922(g)(1). He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the court's jurisdiction under 28 U.S.C. § 1291. His sentence was affirmed by an order entered May 30, 2008. On July 22, 2008, the Eleventh Circuit denied Mr. Johnson's timely filed petition for rehearing and rehearing *en banc*.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 924(e) of Title 18, United States Code, provides in pertinent part that

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .
>
> The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that--
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

Section 784.03, Florida Statutes (2002) provides in pertinent part that

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

STATEMENT OF THE CASE

In the district court, Petitioner Curtis Darnell Johnson pleaded guilty to being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). Docs 34, 36, 37. The statutory maximum penalty for an unenhanced violation of § 922(g)(1) is 10 years' imprisonment. 18 U.S.C. § 924(a)(2).

The presentence investigation report ("PSR") prepared in Mr. Johnson's case found that Mr. Johnson was an armed career criminal under 18 U.S.C. § 924(e), which provides for a minimum mandatory penalty of 15 years' imprisonment and a maximum of life imprisonment for those defendants convicted under § 922(g)(1) who have at least three prior convictions for violent felonies or serious drug offenses. The conviction at issue in the present appeal is Mr. Johnson's 2002 felony battery conviction. The PSR calculated Mr. Johnson's advisory guidelines under the armed career criminal guideline, USSG §4B1.4, and found that Mr. Johnson's enhanced guideline range was 180

to 188 months' imprisonment.

In his objections to the PSR and at sentencing, Mr. Johnson objected to the application of the armed career criminal enhancement to his sentence. Among these objections was an argument that the government could not prove that his 2002 felony battery conviction was a violent felony, because the statute under which Mr. Johnson was convicted could be violated without force by mere unwanted touching.

Florida has two criminal statutes entitled "felony battery:" one is violated when any offender, having a previous battery conviction, commits simple battery. The fact of the prior conviction enhances the offense from a first-degree misdemeanor – punishable by up to a year in prison – to a third-degree felony. *See* Fla. Stat. § 784.03 (2002). The other felony battery statute applies only in cases in which the battery results in great bodily harm, permanent disability, or permanent disfigurement. *See* Fla. Stat. § 784.041 (2002). Mr. Johnson was convicted of the former, which provides that: "the offense of battery occurs when a person: (1) Actually and intentionally touches or strikes another person against the will of the other; or (2) Intentionally causes bodily harm to another person." Fla. Stat. § 784.03 (2002).

It was eventually conceded in the district court that the government could not prove that Mr. Johnson had been convicted of anything other than unwanted touching. Nevertheless, citing precedent from the Eleventh Circuit addressing a Florida state conviction for battery on a law enforcement officer and whether it was a crime of violence for purposes of the Career Offender guideline – *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005) – the government argued that even unwanted touching would be a violent felony under the Armed Career Criminal Act ("ACCA").

The district court overruled Mr. Johnson's objections to the PSR and found that the 2002

battery conviction was properly classified as a violent felony. It then sentenced Mr. Johnson to 185 months' imprisonment. Mr. Johnson filed a timely notice of appeal.

Two days before the final sentencing hearing in Mr. Johnson's case, the Florida Supreme Court had denied rehearing in *State v. Hearns*, 961 So.2d 211 (Fla. 2007), in which the court had held that the Florida offense of simple battery, because it could be committed by mere unwanted touching did not have as a necessary element the use or threatened use of physical force. On appeal, Mr. Johnson argued that *Glover* and its Eleventh Circuit progeny – which held that all batteries under Florida law were violent felonies or crimes of violence because they necessarily had as an element "the use, attempted use, or threatened use of physical force against the person of another" – were no longer good law as a result of *Hearns*. He also argued that the district court lacked the authority to sentence him as an armed career criminal because the predicate offenses for such a classification had not been admitted at his plea.

On May 30, 2008, in a published opinion, the court of appeals affirmed the judgment of the district court. *See United States v. Johnson*, 528 F.3d 1318 (11th Cir. 2008); App., *infra*, 1a-5a. The court wrote:

> The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one. For that reason, nothing that the Florida Supreme Court said in *Hearns* about that state's violent career criminal statute binds us. What we held in [*United States v.*] *Llanos-Agostadero* [486 F.3d 1194 (11th Cir. 2007)] does bind us. We follow its holding in concluding that the touching or striking element in the Florida crime of battery satisfies the physical force requirement of the definition of violent felony or crime of violence contained in 18 U.S.C. § 924(e)(2)(B)(i) and in the guidelines provisions that include the same definition, U.S.S.G. § 2L1.2(b)(1) cmt. n.1(B)(iii), and § 4B1.2(a)(1).

Johnson, 528 F.3d at 1321. On July 22, 2008, the Eleventh Circuit denied Mr. Johnson's timely filed

petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. WHEN A STATE'S HIGHEST COURT HOLDS THAT A GIVEN OFFENSE OF THAT STATE DOES NOT HAVE AS AN ELEMENT THE USE OR THREATENED USE OF PHYSICAL FORCE, THAT HOLDING IS BINDING ON FEDERAL COURTS IN DETERMINING WHETHER THAT SAME OFFENSE QUALIFIES AS A "VIOLENT FELONY" UNDER THE FEDERAL ARMED CAREER CRIMINAL ACT, WHICH DEFINES "VIOLENT FELONY" AS, *INTER ALIA*, ANY CRIME THAT "HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER."

A. Under Supreme Court Rule 10, the Eleventh Circuit's Decision Conflicts with Holdings from this Court and the Florida Supreme Court, Thus Creating a Compelling Reason for this Court to Grant the Petition for Writ of Certiorari.

In *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), the court of appeals held that the Florida offense of battery on a law enforcement officer was a crime of violence under the Career Offender provision of the sentencing guidelines. Necessarily implicit in this holding was a finding that the Florida offense of simple battery – even as committed by mere unwanted touching – had as an element "the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 749; 18 U.S.C. § 924(e)(2)(B)(i); USSG §4B1.2(a)(1).[1] In his brief and arguments before the court of appeals, Mr. Johnson argued that *Glover* and its progeny were no longer good law, as a 2007 decision from the Florida Supreme Court, *State v. Hearns*, 961 So.2d 211 (Fla. 2007), had explicitly held that the same offense did ***not*** have as an element the use or threatened use of

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[1]The Florida offense of simple battery is ordinarily a misdemeanor, but it becomes a felony when, as in Mr. Johnson's case, the offender has a prior battery conviction, or the victim of the battery is of a certain status, *e.g.*, a pregnant woman or a law enforcement officer. *See* Fla. Stat. §§ 784.03, 784.045, 784.07.

physical force. He argued that state courts were the ultimate authority on issues of state law, and that federal courts are bound by their interpretations of state law. *See City of Chicago v. Morales*, 527 U.S. 41, 61, 119 S.Ct. 1849, 1861 (1999). He further argued that the Florida Supreme Court in *Hearns* had placed a broad construction on the state's simple battery statute such that the crime of battery could be committed under state law without the use or threatened use of physical force, and that federal courts had no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. *Id.*

The court of appeals held that the *Hearns* decision had no effect on *Glover* and its progeny. *Johnson*, 528 F.3d at 1321. The court wrote that in *Hearns* the Florida Supreme Court was merely interpreting its state's own forcible felony definition, and that that had no application to the panel's interpretation of the federal Armed Career Criminal Act, as "[t]he issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one. For that reason, nothing that the Florida Supreme Court said in *Hearns* about that state's violent career criminal statute binds us." *Id.*

Mr. Johnson respectfully submits that the holding of the court of appeals – that whether an offense meets the "violent felony" or "crime of violence" definition is purely a question of federal, not state law – is in direct conflict with a long line of cases from this Court holding that in making these determinations as to prior state offenses, federal courts must look to – and accept – state decisional law, especially that which proceeds from the state's highest court, regarding the elements and construction of the offense in question. Mr. Johnson also submits that the court of appeals greatly oversimplified the precise holding of *Hearns*.

In *Hearns*, the Court was called upon to decide whether battery on a law enforcement officer

("BOLEO") was a "forcible felony" for purposes of a state statute that increases criminal sentences for violent career criminals. *Id.* at 212. For purposes pertinent to the issue at hand, "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08[2]; *cf.* 18 U.S.C. § 924(e)(2)(B)(i) (an offense is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another."). The Court noted that "[t]he underlying conduct required for simple battery [§ 784.03, Mr. Johnson's offense of conviction] and BOLEO is identical. The only differences are the status of the victim and the penalty imposed." *Id.* at 214.

The Court then applied to the crime of simple battery the so-called "*Perkins*" test. The "*Perkins* test" derives from *Perkins v. State*, 576 So.2d 1310 (Fla. 1991), in which the Court held that:

> [I]n determining whether an offense constitutes a forcible felony, a court may only consider the statutory elements. The particular circumstances are irrelevant.
>
> . . .
>
> [F]or an offense to be a forcible felony under section 776.08, the "use or threat of physical force or violence" must be a *necessary element* of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony.

Hearns, 961 So.2d at 218 (emphasis in original).[3] In affirming the judgment of the court of appeals,

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[2]In the panel opinion in Mr. Johnson's case, the panel incorrectly quoted the Florida forcible felony statute, deleting the words "physical force" from the definition. *See Johnson*, 528 F.3d at 1321 (stating that §776.08 "defin[ed] forcible felony to include 'any other felony which involves the use or threat of ***violence*** against any individual.'").

[3]The "*Perkins* test" of the Florida courts is thus a mirror image of the categorical approach mandated by this Court in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990), for use by federal courts in determining whether certain prior convictions constitute "violent felonies" under the ACCA. Under this approach, federal courts "look only to the fact of conviction and the statutory definition of the prior offense," and do not generally consider the "particular facts disclosed by the record of conviction." *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143.

the Florida Supreme Court noted that the court of appeals had correctly determined that physical force or violence is not a necessary element of the offense of simple battery. *Id* at 216. "Under *Perkins*," the Florida Supreme Court wrote, "that is the end of the analysis." *Id*.

The Florida Supreme Court assumed that intentionally causing bodily harm to another or intentionally striking another – two of the three ways Florida's battery statute can be violated – involved the use or threat of physical force or violence. *Id*. at 218. The Court found, however, that the remaining way the statute could be violated – unwanted touching – did not have as an element the use or threatened use of physical force. *Id*. In other words, the Court in *Hearns* was not, as the Eleventh Circuit suggests, merely interpreting its own forcible felony definition. *Johnson*, 528 F.3d at 1321. In applying its own statutory elements test, one practically identical to the *Taylor* test used in federal courts, the Florida Supreme Court was required to say what the elements of simple battery were – or were not – under Florida law.

State legislatures and state courts, not federal judges, define the elements of a state criminal offense. *McElroy v. Holloway*, 451 U.S. 1028, 1029, 101 S.Ct. 3019, 3020 (1981) (Rehnquist, J., dissenting). "It is for state courts to determine the elements to be proven to establish criminal liability, and their interpretation is binding on federal courts." *Cole v. Young*, 817 F.2d 412, 416-20 (7th Cir. 1987). Mr. Johnson submits, moreover, that it is past question that when deciding whether a prior state conviction qualifies as a "violent felony" or "crime of violence" for purposes of federal sentence enhancement provisions, federal courts look to how the statutory language defining that offense has been construed by the courts of the state. Two recent examples -- one from this Court, and one from the Eleventh Circuit – illustrate this.

In *James v. United States*, 127 S.Ct. 1586 (2007), the question before this Court was

"whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." 127 S.Ct. at 1590. The Court stated that in so deciding it would only "consider whether the ***elements of the offense*** are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *Id.* at 1594 (emphasis in original). On its face, Florida's attempt statute requires only that a defendant take "any act toward the commission" of burglary. Fla. Stat. § 777.04(1). Petitioner contended that this broad statutory language swept in merely preparatory activity that posed no real danger of harm to others. *James*, 127 S.Ct. at 1594. This Court was able to reject this contention by looking to decisions of the state's highest court:

> [W]hile the statutory language is broad, the Florida Supreme Court has considerably narrowed its application ***in the context of attempted burglary***, requiring an "overt act directed toward entering or remaining in a structure or conveyance."
>
> . . .
>
> Given that Florida law, as interpreted by that State's highest court, requires an overt act directed toward the entry of a structure, we need not consider whether the more attenuated conduct encompassed by such laws presents a potential risk of serious injury under ACCA.

Id. at 1594, 1596 (citation omitted) (emphasis supplied). In other words, the Florida Supreme Court had grafted onto the offense of attempted burglary an element not necessarily required by the statutory language.

When the petitioner in *James* argued that Florida's burglary statute differs from "generic" burglary as defined in *Taylor, supra*, at 598, 110 S.Ct. 2143, because it defines a "dwelling" to include not only the structure itself, but also the "curtilage thereof" and thus fell outside the confines of the violent felony definition, this Court "again turn[ed] to state law in order to answer this question." *James*, 127 S.Ct. at 1600.

> The Florida Supreme Court has construed curtilage narrowly, requiring "some form of an enclosure in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." Given this narrow definition, we do not believe that the inclusion of curtilage so mitigates the risk presented by attempted burglary as to take the offense outside the scope of clause (ii)'s residual provision.

Id. (internal citations omitted).

Similarly, a the Eleventh Circuit was recently called upon to decide whether a conviction for simple battery under Georgia law is a "crime of violence" for purposes of 18 U.S.C. §16(a). *Hernandez v. U.S. Attorney General*, 513 F.3d 1336 (11th Cir. 2008). The petitioner in that case argued that he could be convicted of simple battery under the Georgia battery statute if he put a banana peel in a victim's path, and the banana peel caused the victim to slip, fall, and sustain physical injury or harm. *Id.* at 1342, n.4. The court rejected the argument, noting that "to date Georgia courts have interpreted Georgia's simple battery statute as requiring physical contact. ***We accept the Georgia courts' interpretation of their own battery statute*** . . ." *Id.* (internal citations omitted) (emphasis supplied).

This Court's first important decision interpreting the ACCA explains why the *James* and the *Hernandez* courts felt obliged to look to state court law in reaching their own decisions:

> There [is no] indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

Taylor, 495 U.S. 575, 590, 110 S.Ct. 2143, 2154 (1990). Looking at how a state's highest court has construed the elements of a crime defined by a state statute comports with common sense and is the best way to insure that the congressional requirement of "uniform, categorical definitions" is met.

"It is readily apparent that the highest courts of different states may construe nearly identical statutory language in different ways, and thus mere identity of statutory language does not necessarily indicate identical elements of the offenses, or identical meaning of those elements, as they are defined by comparable statutes." *Franklin v. I.N.S.*, 72 F.3d 571, 583 (8th Cir. 1995) (Bennett, J., dissenting).

Florida's highest court has told us that the Florida offense of simple battery as committed by unwanted touching does not have as an element the use or threatened use of physical force. These are the elements (or lack of them) used to establish criminal liability for simple battery in Florida courts. *See Cole*, 817 F.2d at 416-20 ("It is for state courts to determine the elements to be proven to establish criminal liability, and their interpretation is binding on federal courts"). Contrary to the state court decisions consulted in *James* and *Hernandez*, which served to narrow the application of the statutory language at issue in those cases, *Hearns* ***broadens*** the pertinent statutory language such that the crime of battery can be committed under state law without the use or threatened use of physical force. "[Federal courts] have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *City of Chicago v. Morales*, 527 U.S. at 61, 119 S.Ct. 1861. As a result, Mr. Johnson's 2002 battery conviction was not for a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

Under Supreme Court Rule 10(b) and (c), the Eleventh Circuit's decision conflicts with holdings from this Court and the Florida Supreme Court which creates a compelling reason for this Court to grant the petition for writ of certiorari.

II. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER A PRIOR STATE CONVICTION FOR SIMPLE BATTERY IS IN ALL CASES A "VIOLENT FELONY" - A PRIOR OFFENSE THAT HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER. FURTHER, THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER THE PHYSICAL FORCE REQUIRED IS A *DE MINIMIS* TOUCHING IN THE SENSE OF "NEWTONIAN MECHANICS" OR WHETHER THE PHYSICAL FORCE REQUIRED MUST BE IN SOME WAY VIOLENT IN NATURE - THAT IS THE SORT OF FORCE THAT IS INTENDED TO CAUSE BODILY INJURY, OR AT A MINIMUM LIKELY TO DO SO.

The Circuits are split on the meaning of physical force in a variety of sentencing provisions (both statutory and guideline), and the amount of deference or reliance to place on a state court's determination and interpretation of its own statutes. The Eleventh Circuit's determination that a Florida conviction for simple battery always has as an element the use, attempted use, or threatened use of physical force is in conflict with a decision from the Fifth Circuit holding that a Florida battery on a pregnant woman offense does not require physical force, and illustrates the difficulty the Circuits are encountering in determining the meaning of physical force, with some Circuits employing a *de minimis* touching in the sense of "Newtonian mechanics" test (the First, Eighth, and Eleventh Circuits) and other Circuits are requiring that the physical force must be in some way violent in nature, or something other than merely *de minimis* touching (Fifth, Seventh, Ninth, and Tenth Circuits). The Circuits are in great need of guidance on the meaning of physical force. This guidance will provide consistency for sentencing courts in determining the appropriate and lawful sentence for thousands of defendants facing enhanced sentences due to prior convictions for offenses that, in some circuits are deemed violent, and other circuits deemed non-violent. Moreover, this guidance will put an end to a conflict that has created unwarranted sentencing disparities based on geography.

A. Violent Felony

A violent felony for purposes of the Armed Career Criminal Act is defined as several enumerated offenses[4] and "any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of **physical force** against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). The terms "crime of violence" and "violent felony" are used throughout the sentencing guidelines[5] and in many statutes.[6] Although the definition of these terms is not always identical, most of the definitions contain a similar element-based test for the use, attempted use, or threatened use of physical force against the person of another.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court confronted the meaning of the term "crime of violence" in relation to removal proceedings initiated by the Immigration and Naturalization Service (INS). Under § 237(a) of the Immigration and Nationality Act (INA), "[a]ny alien who is convicted of an aggravated felony . . . is deportable." 66 Stat. 201, 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines aggravated felony to include, *inter alia*, a "crime of violence" as defined in 18 U.S.C. § 16. Section 16 defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of **physical force** against the person or property of another . . . ." 18 U.S.C. § 16(a) (emphasis added). Section 924(c)(3)(A) similarly defines a

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[4] Because simple battery is not one of the enumerated offenses, for this enhancement to apply, the elements of the offense would have to meet the use, attempted use, or threatened use of physical force portion of the definition.

[5] *See, e.g.*, USSG §§2K1.3, 2K2.1, 2L1.2, 2X6.1, 4B1.1, 4B1.2, 4B1.4

[6] *See, e.g.*, 18 U.S.C. §§ 16, 921(a)(33)(A)(ii), 924(c)(3), 924(e), 3156. In fact, a search of all federal statutes reveals over 100 times that the term crime of violence or violent felony is used. Nevertheless, most of the federal statutes refer to the definition of these terms contained in 18 U.S.C. §§ 16, 924(c)(3), 924(e), 3156.

crime of violence as an offense that "has as an element the use, attempted use, or threatened use of **physical force** against the person or property of another . . . ." 18 U.S.C. § 924(c)(3)(A) (emphasis added).

The sentencing guidelines also define a crime of violence in various sections. Throughout each definition, a common component is that the prior offense "has as an element the use, attempted use, or threatened use of physical force against the person [or property] of another." USSG §2L1.2, comment. (n.1(B)(iii))

Because physical force is a term used repeatedly in federal statutes and the sentencing guidelines in relation to a crime of violence and violent felony, this Court's guidance on the meaning of the word would provide great assistance in helping the lower courts treat defendants similarly and fairly.

B. Florida Simple Battery

Mr. Johnson was convicted under section 784.03(1)(a), Florida Statutes, which provides that "[t]he offense of battery occurs when a person actually and intentionally touches or strikes another person against the will of the other." Florida courts have recognized that a battery can be committed even with nominal contact, even slight contact. In *Johnson v. State*, 858 So.2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2003), the Florida appellate court recognized that a defendant could be convicted of a battery on a law enforcement officer (a felony) by spitting on the law enforcement officer. The court characterized this battery as an unwanted touching. *Id.* Nevertheless, the court recognized that spitting on a law enforcement officer "did not amount to the use or threat of use of physical force or violence." *Id.*

This interpretation of Florida's statute was recently reinforced by a Florida Supreme Court

decision. In *State v. Hearns*, 961 So.2d 211 (Fla. 2007), the Florida Supreme Court was called upon to decide whether battery on a law enforcement officer was a "forcibile felony"[7] for purposes of a state statute that increases criminal sentences for violent career criminals. *Id.* at 212. The Court began by examining the elements of a simple battery (the underlying conduct of a battery on a law enforcement officer) and determined that the offense could be "committed with only nominal contact" or "any intentional touching, no matter how slight." *Id.* at 218. Thus, the Court next found that simple battery did not include as an element "'the use or threat of physical force or violence against any individual.'" *Id.* at 216 (quoting Fla. Stat. § 775.082(9)(a)(1) (2002)).

C. The Eleventh Circuit's Holdings

In Mr. Johnson's case the Eleventh Circuit held that the touching element in the Florida crime of battery satisfies the physical force requirement of the definition of violent felony or crime of violence contained in 18 U.S.C. § 924(e)(2)(B)(i) and in the guidelines provisions that include the same definition. *Johnson*, 528 F.3d at 1321. The court reached this holding by relying on circuit precedent: *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007); *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005) and *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006). In *Llanos-Agostadero*, the court recognized that a Florida battery could be committed by just mere touching, but the court found nonetheless that even mere touching constituted physical force. In *Glover*, the Eleventh Circuit set forth the elements of simple battery under Florida law and held that simple battery on a law enforcement officer was a crime of violence under USSG §4B1.2(a). *Glover*, 431 F.3d at 749. Like § 924(e)(2)(B)(i), §4B1.2 defined a crime of violence as, *inter alia*, any

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[7] For purposes pertinent to the issue at hand, "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 775.082(9)(a)(1) (2002).

offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* (quoting USSG §4B1.2(a)(1)).

In *Griffith*, the Eleventh Circuit held that a simple battery under Georgia law (which occurs when a person "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another) constitutes a crime of domestic violence under 18 U.S.C. § 922(g)(9), which like the Application Note for §2L1.2(b)(1), defined a crime of domestic violence to include, *inter alia*, any offense that "has, as an element, the use or attempted use of physical force." *Griffith*, 455 F.3d at 1340-1345. The Eleventh Circuit rejected the holdings from other Circuits which had reasoned that "the physical force requirement in the ACCA cannot possibly include 'any touching' in the sense of 'Newtonian mechanics' and held that the physical force requirement cannot be satisfied by 'de minimis' touching." *Id.* at 1343 (criticizing the Seventh[8] and Ninth[9] Circuits holdings on the meaning of physical force).

Thus, the Eleventh Circuit's position is that a felony battery (whether due to the status of the victim, pregnant woman or law enforcement officer, or the defendant's prior battery conviction) - a touching of another person against that person's will - no matter how slight and whether or not the touching is offensive, contains the requisite element of physical force against the person of another to qualify as a crime of violence or violent felony.

D. The Fifth Circuit's Conflicting Holding

In direct conflict with the Eleventh Circuit's holding in *Llanos-Agostadero*, the Fifth Circuit held that a Florida battery on a pregnant woman offense could be committed without the use,

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[8] *Flores v. Ashcroft*, 350 F.3d 666, 669-700 (7th Cir. 2003).

[9] *United States v. Belless*, 338 F.3d 1063, 1067-1068 (9th Cir. 2003).

attempted use, or threatened use of physical force. *United States v. Gonzalez-Chavez*, 432 F.3d 334, 338 n.6 (5th Cir. 2005). Examining Florida Statute § 784.045 and a Florida state court's interpretation of the statute, the Fifth Circuit noted that a person could be convicted of the crime merely because the person spit on a pregnant woman; however, although the spitting would be an unwanted touching, "it does not amount to the use or threat of use of physical force or violence." *Id.* (quoting *Johnson*, 885 So.2d at 1072). As such, the Fifth Circuit found that a Florida conviction for battery on a pregnant woman did not contain as an element of the use, attempted use, or threatened use of physical force required under USSG §2L1.2, comment. (n.1)(B)(iii)). The Fifth Circuit's decision in *Gonzalez-Chavez* directly conflicts with the Eleventh Circuit's decision in *Llanos-Agostadero*. Under Supreme Court Rule 10(a), this Circuit conflict creates a compelling reason for this Court to grant the petition for writ of certiorari.

E. Conflicting Circuit Test for Determining Physical Force

In addition to the direct conflict between the Fifth and Eleventh Circuits on whether a Florida battery offense has as an element the use, attempted use, or threatened use of physical force, the Circuits are split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

1. *De Minimis* Touching

The First, Eighth, and Eleventh Circuits have held that, with reference to varying state battery statutes, that a person cannot make physical contact - particularly of an insulting or provoking nature - with another without exerting some level of physical force. *United States v. Nason*, 269 F.3d 10,

20-21 (1st Cir. 2001) (concluding that a state statute criminalizing "offensive physical contact" requires the use of physical force so that a violation of it qualifies as a crime of domestic violence for 18 U.S.C. § 922(g)(9) purposes); *United States v. Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (concluding that a state statute that contains "insulting or offense physical contact" as an element requires the use of physical force so that a violation of it qualifies as a crime of domestic violence under 18 U.S.C. § 922(g)(9)); *Llanos-Agostadero*, 486 F.3d at 1197-1198 (holding that a simple battery on a pregnant woman, even if mere touching which is neither offensive or provoking, contains as an element the use of physical force ; thus, the prior conviction qualifies as a crime of violence under USSG §2L1.2(b)(1)(A)); *Griffith*, 455 F.3d at 1341-1345 (holding that, under the plain meaning rule, the physical contact of an insulting or provoking nature made illegal under the Georgia statute satisfies the physical force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)).

In *Griffith*, the Eleventh Circuit defined physical force based on a definition from Black's Law Dictionary. The Eleventh Circuit held that the plain meaning of physical force "is '[p]ower, violence, or pressure directed against a person' ' consisting in a physical action.'" *Griffith*, 455 F.3d at 1342 (quoting Black's Law Dictionary 673 (8th ed. 1999)). Thus, the court reasoned that even a smidgeon of pressure constituted physical force. *Id.* at 1344. The court rejected other Circuits which had criticized this *de minimis* touching approach; rather, the court concluded that the other Circuits were effectively inserting the word "violent" into the definition of physical force and that the approach from other Circuits was at war with common sense. *Id.* at 1343-1345.

2. Physical Force Must Be Violent in Nature

In contrast, the Fifth, Seventh, Ninth, and Tenth Circuits have rejected the *de minimis* touching in the sense of "Newtonian mechanics" test; rather, these Circuits hold that the physical

force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so. *See Gonzalez-Chavez*, 432 F.3d at 338 n.6 (holding that a Florida conviction for aggravated battery on a pregnant woman did not contain as an element of the use, attempted use, or threatened use of physical force required under USSG §2L1.2, comment. (n.1)(B)(iii)); noting that a person could be convicted of the crime merely because the person spit on a pregnant woman (although an unwanted touching), "it does not amount to the use or threat of use of physical force or violence") (quoting *Johnson*, 885 So.2d at 1072); *Flores v. Ashcroft*, 350 F.3d 666, 669-672 (7th Cir. 2003) (holding that any touching did not equate with the physical force required under 18 U.S.C. § 16; otherwise, the throwing of a snowball, spitball, or paper airplane qualified if it reached its target); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1017-1016-1018 (9th Cir. 2006) (explaining that the court had held that conduct involving mere offensive touching did not ride to the level of a "crime of violence;" "we have squarely held that the force necessary to be a crime of violence must actually be violent in nature"); *United States v. Belless*, 338 F.3d 1063, 1067-1068 (9th Cir. 2003) ("Any touching constitutes 'physical force' in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*"); *United States v. Hayes*, 526 F.3d 674, 679-680 (10th Cir. 2008) (acknowledging that battery offenses can vary widely and may include "kissing without consent, touching or tapping, jostling, and throwing water," the court thought of many "'touchings' that might be considered 'rude' or 'insolent' in a domestic setting but would not rise to the level of physical force discussed above. For example, in the midst of an argument, a wife might angrily point her finger at her husband and he, in response,

might swat it away with his hand. This touch might very well be considered 'rude' or insolent' in the context of a vehement verbal argument, but it does not entail 'use of physical force' in anything other than an exceedingly technical and scientific way").

In *Flores*, the court addressed the meaning of the term physical force. The court acknowledged that every battery "involves 'force' in the sense of physics or engineering, where force means the acceleration of mass." 350 F.3d at 672. The court stated:

> A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. That's a tiny amount; a paper airplane conveys more . . . . Perhaps one *could* read the word "force" in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones. . . . Suppose someone finds a set of keys that the owner dropped next to his car and, instead of taking them to a lost and found, turns the key in the lock and drives away. One would suppose that to be a paradigm non-violent offense, yet turning the key in the lock requires "physical force" (oodles of dynes) directed against the property (the auto) of another.

Id. (emphasis in original). To avoid collapsing the distinction between violent and non-violent offenses, the court treated the word force "as having a meaning in the legal community that differs from its meaning in the physics community." *Id.* Thus, the court insisted "that the force be violent in nature - the sort that is intended to cause bodily harm, or at a minimum likely to do so." *Id.*

This conflict between the Circuits on how to define physical force has created a compelling reason for this Court to grant Mr. Johnson's petition for writ of certiorari. *See* Sup. Ct. R. 10(a).

III. THE DISTRICT COURT LACKED THE AUTHORITY TO SENTENCE MR. JOHNSON AS AN ARMED CAREER CRIMINAL, GIVEN THAT MR. JOHNSON DID NOT ADMIT THE PREDICATE OFFENSES FOR SUCH A CLASSIFICATION WHEN HE PLED GUILTY.

Under the Sixth Amendment, a sentencing court lacks the authority to enhance a defendant's sentence beyond the statutory maximum based on facts that were not proven to a jury beyond a reasonable doubt or expressly admitted by the defendant. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363 (2000). This Court has clarified that the term "statutory maximum" as used in *Apprendi* does not refer to the absolute maximum sentence authorized by the legislature for the specific offense, but rather, "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S. Ct. 2531, 2537 (2004).

In Mr. Johnson's case, his Sixth Amendment rights were violated when the district court sentenced him based on facts that were not found by a jury beyond a reasonable doubt or admitted by him. Mr. Johnson was charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) which, under 18 U.S.C. § 924(a)(2), carries a maximum term of imprisonment of ten years. Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), this statutory maximum is increased to life imprisonment with a mandatory minimum of fifteen years imprisonment if the defendant has three previous convictions for a "violent felony" or "serious drug offense." The district court determined Mr. Johnson had three prior convictions that were either a violent felony or serious drug offense – facts not admitted to by Mr. Johnson in his guilty plea – and sentenced him

as an armed career criminal to 185 months' imprisonment.

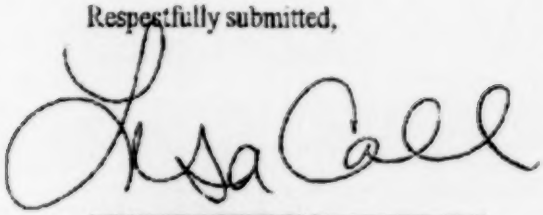
Mr. Johnson does not dispute that in *Apprendi*, this Court excepted from its Sixth Amendment rule the "fact of a prior conviction," given that Apprendi had not challenged the Court's prior decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998). Nor does Mr. Johnson dispute that *Blakely* and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) (following *Apprendi*) continued to except the "fact of a prior conviction" from the Sixth Amendment rule. *Blakely*, 542 U.S. at 301, 124 S.Ct. at 2536; *Booker*, 543 U.S. at 244, 125 S.Ct. at 756.

Nevertheless, a Justice of this Court has written that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided," and urged that "in an appropriate case, the Court should consider *Almendarez-Torres*' continuing viability," because "[i]nnumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable doubt requirements." *Shepard v. United States*, 544 U.S. 13, 26-27, 125 S.Ct. 1254, 1264 (2005) (Thomas, J., concurring in part and concurring in the judgment). Mr. Johnson, notwithstanding his failure to object in the district court, submits that his is the appropriate case for this Court to "consider *Almendarez-Torres*' continuing viability."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
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No. 08-6925

IN THE SUPREME COURT OF THE UNITED STATES

CURTIS DARNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for felony battery under Florida law is a "violent felony" under the Armed Career Criminal Act. 18 U.S.C. 924(e)(2)(B)(i).

2. Whether Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 528 F.3d 1318.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. A petition for rehearing was denied on July 22, 2008. Pet. App. B1. The petition for a writ of certiorari was filed on October 20, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court

for the Middle District of Florida, petitioner was convicted of being a felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1). Because he had been convicted on three prior occasions for a "violent felony," petitioner was subject to a 15-year mandatory minimum sentence under 18 U.S.C. 924(e)(1). The district court sentenced him to 185 months of imprisonment. The court of appeals affirmed. Pet. App. A1-A5.

1. On August 9, 2006, police officers were dispatched to petitioner's residence in response to a domestic disturbance between him and Carol Woodbury. During the altercation, petitioner yelled at Woodbury, bit her finger, and retrieved a rifle and loaded it. Petitioner and Woodbury subsequently left the residence separately, and the officers arrested petitioner without incident when he came out. The officers also recovered a rifle, a semi-automatic pistol, and ammunition from petitioner's residence. Presentence Report ¶¶ 5-10 (PSR).

Petitioner has an extensive criminal history, including felony convictions under Florida law for aggravated battery, burglary, and battery. PSR ¶¶ 30, 31, 48.[1]

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[1] Under Florida law, a battery occurs "when a person [a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). Violations of that statute are first-degree misdemeanors, see Fla. Stat. § 784.03(1)(b), except that "[a] person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree." Fla. Stat. § 784.03(2). Accordingly, petitioner's

2. A federal grand jury in the Middle District of Florida returned a single-count indictment charging petitioner with possession of ammunition as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to the charge.

3. The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence for an individual convicted under 18 U.S.C. 922(g) who also has three prior convictions for a "violent felony." 18 U.S.C. 924(e)(1). The PSR applied ACCA to petitioner due to his three prior Florida state convictions. PSR ¶ 24. Based on the relevant Sentencing Guidelines and ACCA's mandatory minimum 15-year sentence, the PSR recommended an advisory sentencing range of 180 to 188 months of imprisonment. Id. ¶¶ 102-103.

As relevant here, petitioner objected to the PSR's recommendation on two grounds. First, he contended that to sentence him on the basis of the PSR's finding that his prior felony convictions subjected him to ACCA without a supporting jury verdict would violate his Sixth Amendment right to a jury trial. Second, he contended that his felony conviction for battery was not a "violent felony" because battery can be committed by offensive touching. PSR Add.

4. The district court overruled petitioner's objections, accepted the PSR's application of ACCA and its advisory sentence

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battery conviction was elevated to felony status by virtue of his prior aggravated battery conviction.

calculation, and sentenced petitioner to 185 months of imprisonment. Pet. 4-5.

5. The court of appeals affirmed. Pet. App. A1-A5. As relevant here, the court rejected petitioner's claim that he should not have been sentenced as an armed career criminal because, in his view, "felony battery under Florida law does not come within the definition of 'violent felony' that is contained in the ACCA." Id. at A1. The court explained that its precedent made clear that "[t]he crime of battery under Florida law * * * requires at a minimum the actual and intentional touching or striking of another person against that other person's will." Id. at A2 (citing United States v. Llanos-Agostadero, 486 F.3d 1194, 1197 (11th Cir. 2007) (per curiam), petition for cert. pending, No. 08-6486, and United States v. Glover, 431 F.3d 744, 749 (11th Cir. 2005) (per curiam)). Those decisions, in turn, held that battery under Florida law was a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1), see Llanos-Agostadero, 486 F.3d at 1196-1198, and Sentencing Guidelines § 4B1.2(a), see Glover, 431 F.3d at 749. The court then explained that, because the relevant part of the "violence" definition in those guidelines provisions was "identical to the definition of the violence element" in ACCA's definition of a "violent felony," it "follows that [the] Llanos-Agostadero and Glover decisions about this same definition of violence apply with full force in [ACCA] cases, unless they have been overruled in some

relevant respect." Pet. App. A3.

The court then rejected petitioner's argument that those decisions had in fact been overruled by State v. Hearns, 961 So. 2d 211 (Fla. 2007), in which the Florida Supreme Court held that battery was not a "forcible felony" for purposes of the State's own violent career criminal statute. Pet. App. A2-A4. The court of appeals concluded that Hearns had not undermined any state-law premises in its prior decisions because "[t]he issue of whether [ACCA] applies to the state law defined crime of battery is a federal question, not a state one." Id. at A4.

The court also rejected petitioner's contention that "the district court lacked the authority to sentence him as an armed career criminal because he did not admit in his guilty plea to the facts necessary to being one." Pet. App. A5. The court found that contention "foreclosed by" Almendarez-Torres v. United States, 523 U.S. 224 (1998).

The court denied petitioner's timely petition for rehearing and rehearing en banc. Pet. App. B1.

ARGUMENT

1. Petitioner renews his contention (Pet. 6-21) that felony battery under Florida law is not a "violent felony" for purposes of 18 U.S.C. 924(e)(2)(B). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further

review is therefore not warranted.

a. The court of appeals correctly concluded that felony battery under Fla. Stat. § 784.03 qualifies as a "violent felony" within the meaning of 18 U.S.C. 924(e)(2)(B).

Under ACCA, a "violent felony" includes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Florida's felony offense for battery requires physical contact with another person because it applies only "when a person [a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). As the Eleventh Circuit explained in United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), a person "cannot make physical contact * * * with another without exerting some level of physical force." See also United States v. Nason, 269 F.3d 10, 20 (1st Cir. 2001) (stating that "offensive physical contacts" with another person's body under Maine assault statute "invariably emanate from the application of some quantum of physical force"); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (explaining that "insulting or offensive" physical contact under Iowa assault statute "by necessity * * * requires physical force to complete"); cf. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (stating in dicta that for purposes of definition of "crime of violence" in 18 U.S.C. 16(a),

"a person would 'use . . . physical force against' another when pushing him"). Accordingly, a battery under Florida law qualifies as a "violent felony" under ACCA.

b. Contrary to petitioner's contention (Pet. 7), the court of appeals' decision is not "in direct conflict" with this Court's determination that a federal court is bound by a state court's definition of the elements of a state criminal offense. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (noting "that state courts are the ultimate expositors of state law" and accepting state supreme court's construction of homicide law). The court of appeals in this case correctly relied on state law in considering the elements of petitioner's prior felony battery conviction. See Pet. App. A4 (reviewing prior federal cases applying the Florida definition of battery, citing State v. Hearns, 961 So. 2d 211 (Fla. 2007), and noting that Hearns states that "any intentional touching against another person's will is battery even if insufficient to injure"). But as the court of appeals also explained, while the elements of the offense present a question of state law, the determination whether the offense amounts to a "violent felony" under ACCA is itself a federal question. See ibid. ("The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one.").

Petitioner's reliance (Pet. 6-12) on Hearns is therefore

misplaced. Hearns held that battery committed against a law enforcement officer did not categorically involve "physical force or violence" for purposes of Florida's own violent career criminal statute. 961 So. 2d at 219. The question here, however, is whether Florida felony battery involves "physical force" and is therefore a "violent felony" under the federal armed career criminal statute. Whether Florida state courts categorize felony battery as not involving "physical force" under a state law provision is thus irrelevant here. See, e.g., United States v. Walker, 442 F.3d 787, 788 (2d Cir. 2006) (per curiam) ("Congress chose to define 'violent felony' by reference to the elements of the offense of conviction rather than to the status of that offense within the relevant state law.").

c. Petitioner also contends on two grounds that the courts of appeals are divided on classifying crimes as violent. That contention lacks merit and does not warrant further review.

First, petitioner contends (Pet. 18) that decisions from the Eleventh and Fifth Circuits "directly conflict[]" on whether the Florida offense of battery committed against a pregnant woman, Fla. Stat. § 784.045(1)(b), is a "crime of violence" under Sentencing Guidelines § 2L1.2. Compare Llanos-Agostadero, 486 F.3d at 1198 (holding that it is), with United States v. Gonzalez-Chavez, 432 F.3d 334, 338 n.6 (5th Cir. 2005) (suggesting that it is not). There is no such conflict, however, because the Fifth Circuit's

discussion on the point was dicta. See id. at 338 & n.6 (remanding to sentencing court because "the record does not indicate" the defendant's prior offenses and noting in passing that battery committed against a pregnant woman under Florida law "is not clearly a crime of violence"). But even assuming that a conflict exists in that context, petitioner's battery conviction arose under Florida's standard battery statute, Fla. Stat. § 784.03, not under its battery statute pertaining to pregnant women, Fla. Stat. § 784.045(1)(b). Likewise, petitioner's case arises under ACCA's definition of "violent felony," not under the Sentencing Guidelines' definition of "crime of violence" at issue in Llanos-Agostadero and Gonzalez-Chavez, and any conflict regarding the application of the Guidelines can be addressed by the Sentencing Commission without any need for intervention by this Court.

Second, petitioner contends (Pet. 19-21) that the Eleventh Circuit's position that physical contact against the will of another constitutes physical force conflicts with decisions from the Fifth, Seventh, Ninth, and Tenth Circuits. According to petitioner (id. at 19-20), those courts "hold that the physical force required must be in some way violent in nature." Although the federal statutory provisions at issue in those cases are materially identical to the ACCA provision at issue here, those decisions do not directly conflict with the decision below because they involved neither Florida's general battery statute nor ACCA's

"violent felony" definition. See Gonzalez-Chavez, 432 F.3d 334 (discussed above) (involving Florida statute pertaining to battery committed against a pregnant woman and Sentencing Guidelines § 2L1.2's definition of "crime of violence"); Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) (involving Indiana battery statute and 18 U.S.C. 16's definition of "crime of violence"); Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006) (involving California battery statute and 18 U.S.C. 16's definition of "crime of violence"); United States v. Hays, 526 F.3d 674 (10th Cir. 2008) (involving Wyoming battery statute and 18 U.S.C. 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence"); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003) (involving Wyoming battery statute and 18 U.S.C. 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence"). Accordingly, the decision in this case does not squarely conflict with any of those decisions, and further review thus is unwarranted.

2. Petitioner also asks the Court (Pet. 22-23) to overrule its decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), in which it held that a prior criminal-conviction need not be alleged in a federal indictment and proved to a jury beyond a reasonable doubt to support an enhancement above the otherwise applicable maximum sentence. That contention does not warrant review.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court

held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Since then, the Court has repeatedly reaffirmed that Apprendi applies to any fact that enhances the statutory maximum penalty "[o]ther than a prior conviction." Cunningham v. California, 127 S. Ct. 856, 864 (2007); see James v. United States, 127 S. Ct. 1586, 1600 n.8 (2007) ("[P]rior convictions need not be treated as an element of the offense for Sixth Amendment purposes."); see also United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004). In addition, this Court has repeatedly denied petitions for a writ of certiorari that have urged overruling Almendarez-Torres. See, e.g., Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of the petitions for writ of certiorari) ("[T]here is no special justification for overruling Almendarez-Torres. * * * The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.") (Nos. 05-10743, 05-10706, 05-10815); Cerna-Salquero v. United States, 545 U.S. 1130 (2005) (No. 04-9248); Ortiz-Rosas v. United States, 543 U.S. 1124 (2005) (No. 04-6950); Aguilera-De Flores v. United States, 542 U.S. 906 (2004) (No. 03-9351); Garza-Garza v. United States, 541 U.S. 1031 (2004) (No. 03-8730); Garcia-Saldivar

v. United States, 541 U.S. 1011 (2004) (No. 03-8536). There is no reason for a different outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008

REPLY BRIEF

Supreme Court, U.S.
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ORIGINAL

No. 08-6925

IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

---

REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2008

CURTIS DARNELL JOHNSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY TO BRIEF IN OPPOSITION

In response to pages 7-8 of the Brief for the United States in Opposition:

The Florida Supreme Court has held that the Florida crime of simple battery, as committed by intentional touching, does not have as an element the use or threatened use of physical force. *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007) The court construed the statute broadly, finding that it could be violated without the use of physical force. *Id.* For its part, the Eleventh Circuit, in deciding whether that same crime was a violent felony under the Armed Career Criminal Act, applied its own independent analysis and arrived at the conclusion that the Florida crime of simple battery ***does*** have as an element the use or threatened use of physical force. *United States v. Johnson*, 528 F.3d 1318,

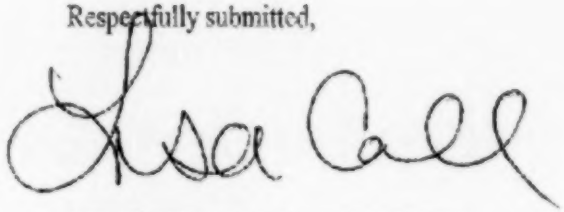
1321 (11th Cir. 2008). The court of appeals construed the statute narrowly, finding that it ***could not*** be violated without using physical force. *Id.*

If, as the United States argues in its brief in opposition, the court of appeals was entitled to draw its own independent conclusions regarding the statutory elements of a state offense, and was moreover entitled to construe that same state statue more narrowly than the state's highest court itself had done, Mr. Johnson's petition for writ of certiorari is due to be denied (unless, of course, this Court's grants Mr. Johnson's request to revisit its holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998)). If, on the other hand, as a long line of cases from this Court has held, the court of appeals was bound by the state's highest court's interpretation of its own law, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and was without authority to construe the language of a state statute more narrowly than the construction given by that state's highest court, *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999), Mr. Johnson's petition should be granted.

CONCLUSION

Based on the reasoning and citations of authority set forth above and in Mr. Johnson's petition for writ of certiorari, Mr. Johnson requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,



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UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, LISA CALL, do declare that on this date, December 30, 2008, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached RESPONSE TO BRIEF IN OPPOSITION on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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JOINT APPENDIX

129

(2)

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IN THE

Supreme Court of the United States

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

(Jacksonville)

Case No. 3:06-cr-00327-VMC-HTS-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

CURTIS DARNELL JOHNSON,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
09/27/2006	1	INDICTMENT returned in open Court as to Curtis Darnell Johnson (1) count(s) 1. (PAM) (Entered: 09/28/2006)
		* * * *
10/06/2006	10	ORDER granting 6 Oral Motion to appoint counsel. Lisa Ann Call appointed for Curtis Darnell Johnson (1). Signed by Judge Marcia Morales Howard on 10/6/2006. (JLW) (Entered: 10/06/2006)
		* * * *
01/25/2007	32	NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis *(Amended)* by USA as to Curtis Darnell Johnson (Henry, Ronald) (Entered: 01/25/2007)

DATE	NO.	PROCEEDINGS

* * * *

01/30/2007	34	Minute Entry for proceedings held before Judge Marcia Morales Howard: CHANGE of plea hearing as to Curtis Darnell Johnson held on 1/30/2007. (DIGITAL) (JLW) (Entered: 01/31/2007)
01/30/2007	35	NOTICE AND CONSENT regarding entry of a plea of guilty as to Curtis Darnell Johnson. (JLW) (Entered: 01/31/2007)
01/31/2007	36	REPORT AND RECOMMENDATION concerning plea of guilty re: Count One of the Indictment as to Curtis Darnell Johnson. Signed by Judge Marcia Morales Howard on 1/31/2007. (JLW) (Entered: 01/31/2007)

* * * *

03/09/2007	37	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count(s) One of the Indictment as to Curtis Darnell Johnson. Signed by Virginia M. Hernandez Covington. Sentencing set for 5/24/2007 at 10:30 AM in Courtroom 10 D before Judge Virginia M. Hernandez Covington. (DTS) (Entered: 03/09/2007)
05/16/2007	38	MOTION to reduce sentence *for timely notification of intent to enter a plea of guilty* by USA as to Curtis Darnell Johnson. (Henry, Ronald) (Entered: 05/16/2007)

DATE	NO.	PROCEEDINGS
05/24/2007	39	Minute Entry for proceedings held before Judge Virginia M. Hernandez Covington: Sentencing hearing: Sentencing did not occur held on 5/24/2007 as to Curtis Darnell Johnson Court Reporter: Marie Splane (PAM) (Entered: 05/25/2007)
05/24/2007	40	ORAL MOTION to continue sentencing hearing by USA as to Curtis Darnell Johnson. (DTS) (Entered: 06/05/2007)
05/24/2007	41	ORAL ORDER granting 40 Motion to continue sentencing as to Curtis Darnell Johnson. Signed by Judge Virginia M. Hernandez Covington on 6/5/2007. (DTS) (Entered: 06/05/2007)
		* * * *
07/12/2007	43	Minute Entry for proceedings held before Judge Virginia M. Hernandez Covington: SENTENCING held on 7/12/2007 for Curtis Darnell Johnson (1), Count(s) 1, Imprisonment: 185 months; Supervised Release: 60 months; Special Assessment: $100.00. Court recommends confinement at: FCI Jesup, Georgia. Court Reporter: Marie Splane; Defendant remanded to the custody of U.S. Marshal. (PAM) (Additional attachment(s) added on 3/4/2009: # 1 Exhibit Exhibit 1 originally filed in open court on 7/12/07, not previously scanned and attached to the sentencing minute entry) (PAM). (Entered: 07/16/2007)

DATE	NO.	PROCEEDINGS
07/12/2007	45	ORAL ORDER granting 38 Motion to Reduce Sentence as to Curtis Darnell Johnson (1). Signed by Judge Virginia M. Hernandez Covington on 7/12/2007. (PAM) (Entered: 07/16/2007)
07/16/2007	44	JUDGMENT as to Curtis Darnell Johnson (1), Count(s) 1, Imprisonment: 185 months; Supervised Release: 60 months; Special Assessment: $100.00 Signed by Judge Virginia M. Hernandez Covington on 7/13/2007. (PAM) (Entered: 07/16/2007)
07/27/2007	46	NOTICE OF APPEAL by Curtis Darnell Johnson re 44 Judgment Filing fee not paid. (Call, Lisa) (Entered: 07/27/2007)
		* * * *
08/28/2007	49	TRANSCRIPT of digitally recorded change of plea hearing for dates of 1/30/07 held before Judge Marcia Morales Howard, re: 46 Notice of appeal as to Curtis Darnell Johnson. Court Reporter: Marie Splan. Filed separately. (SEG) (Entered: 08/28/2007)
08/28/2007	50	TRANSCRIPT of sentencing hearing for dates of 5/24/07 held before Judge Virginia M. Hernandez Covington, re: 46 Notice of appeal as to Curtis Darnell Johnson. Court Reporter: Marie Splane. Filed separately. (SEG) (Entered: 08/28/2007)

DATE	NO.	PROCEEDINGS
08/28/2007	51	TRANSCRIPT of sentencing hearing for dates of 7/12/07 held before Judge Virginia M. Hernandez Covington, re: 46 Notice of appeal as to Curtis Darnell Johnson. Court Reporter: Marie Splane. Filed separately. (SEG) (Entered: 08/28/2007)
		* * * *
07/31/2008	58	JUDGMENT of USCA (certified copy) as to Curtis Darnell Johnson re 46 Notice of appeal, issued as Mandate 7/30/08 and EOD: 5/30/08. USCA number: 07-13497-FF. (SEG) (Entered: 07/31/2008)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 07-13497-FF

CURTIS DARNELL JOHNSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/27/2007	Fee Status: IFP (07/27/07) For Curtis Darnell Johnson
	* * * *
08/01/2007	Dkt2 (Docketing Notice) Issued. to: Lisa Call; C: Paul I. Perez, Jr.; C:R. Fletcher Peacock; C: Ronald Thomas Henry; C: Sheryl L. Loesch; C: Tamra Phipps
	* * * *
11/09/2007	Appellant Brief Filed: (Atty: Lisa Call)
11/09/2007	Record Excerpts: (Atty: Lisa Call)
	* * * *
12/26/2007	Motion To File Corrected Pages To Brief (Atty: Patricia D. Barksdale)
	* * * *

DATE	PROCEEDINGS
12/28/2007	Motion to File Corrected Pages to Brief is Granted. RVG
	* * * *
01/14/2008	Reply Brief Filed: (Atty: Lisa Call)
	* * * *
05/22/2008	Oral Argument Scheduled: 05/22/08
	* * * *
05/30/2008	Judgment Entered
	* * * *
05/30/2008	Opinion Issued
06/20/2008	Petition For Rehearing En Banc: (Atty: Lisa Call)
07/22/2008	The Petition(s) for Rehearing are Denied and no Judge in regular active service on the Court having requested that the Court be polled On Rehearing En Banc, the Petition(s) for Rehearing En Banc are Denied.
	* * * *
07/30/2008	Mandate Issued
	* * * *
10/27/2008	Notice Of Filing Certiorari: 08-6925 (Atty: Lisa Call)
2/27/2009	Certiorari Granted: 08-6925 (Atty: Lisa Call)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:06-cr-327-J3MMH
Ct.1: 18U.S.C. § 922(g)(1) and § 924(e)
Forfeiture: 18 U.S.C. § 924(d) and
28 U.S.C. § 2461(c)

UNITED STATES OF AMERICA

v.

CURTIS DARNELL JOHNSON

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about August 9, 2006, in Duval County, in the Middle District of Florida,

CURTIS DARNELL JOHNSON,

the defendant herein, did knowingly possess in and affecting commerce, ammunition, that is, 45 rounds of F.C., .30 caliber carbine ammunition, after having previously been convicted of crimes punishable by imprisonment for a term exceeding one year, that is:

1. Aggravated Battery, in Case Number 85-4872-CF, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about October 21, 1986;

2. Burglary of a Dwelling, in Case Number 86-10105-CF, in the Circuit Court, Fourth

Judicial Circuit, in and for Duval County, Florida, on or about October 21, 1986;

3. Felony Battery, in Case Number 16-2002-CF-4806-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about May 16, 2003;

4. Possession of Cocaine, in Case Number 16-2002-CF-9163-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about May 16, 2003;

5. Possession of Cocaine, in Case Number 16-2003-CF-2904-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about May 16, 2003;

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FORFEITURE

1. The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

CURTIS DARNELL JOHNSON

the defendant herein, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), all ammunition involved in the commission of the offense, including, but not limited to, 45 rounds of F.C., .30 caliber carbine ammunition.

2. If any of the property described in paragraph 1, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL,

/s/ Gail C. Fowler
Foreperson

PAUL I. PEREZ
United States Attorney

By: /s/ RONALD T. HENRY
RONALD T. HENRY
Assistant United States Attorney
Deputy Chief, Jacksonville Division

By: /s/ BRIAN M. KANE
BRIAN M. KANE
Assistant United States Attorney
Chief, Jacksonville Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THE UNITED STATES OF AMERICA

vs.

CURTIS DARNELL JOHNSON

INDICTMENT

Violations:

18 U.S.C. § 922(g)(1) and § 924(e)

A true bill,

/s/ GAIL C. FOWLER
Foreperson

Filed in open court this 27th day of September A.D. 2006.

Illegible
Clerk

Bail $_____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:06-cr-327-J-33HTS

UNITED STATES OF AMERICA
Plaintiff,

vs.

CURTIS DARNELL JOHNSON
Defendant.

TRANSCRIPT OF SCHEDULED SENTENCING
HEARING BEFORE THE HONORABLE
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

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* * * *

PROCEEDINGS

May 24, 2007

(Defendant present.)

THE COURT: *United States versus Curtis Darnell Johnson.* Case 06-criminal-327-J-33HTS.

Would counsel please state their appearances.

MR. TALBOT: Frank Talbot for the United States.

MS. CALL: Lisa Call of the Federal Defender's Office on behalf of Mr. Johnson.

THE COURT: And we also have Mr. Anderson from probation.

Curtis Darnell Johnson, on January 24th, 2007, you entered a plea of guilty to count 1 of the indict-

ment, charging possession of ammunition by a prohibited person, in violation of Title 18 United States Code, Sections 922(g) (1) and 924(e). The Court has accepted your guilty plea and adjudged you guilty of said offense. We have now reached the stage in the proceedings where it is my duty to address several questions to you and your attorney and the counsel for the government.

Mr. Talbot, have you had the opportunity to read the presentence report?

MR. TALBOT: I have and Mr. Henry has, Your Honor.

THE COURT: Your office has?

MR TALBOT: Yes, Sir

THE COURT: Any objections to the factual accuracy of the report?

MR. TALBOT: No objections from the United States.

THE COURT: And no objections to the probation officer's application of the guidelines either?

MR. TALBOT: No objections.

THE COURT: Ms. Call, have you had the opportunity to read and discuss with Mr. Johnson the presentence report?

MS. CALL: Yes, Your Honor.

THE COURT: Do you have any objections as to the factual accuracy of the report?

MS. CALL: Judge, I did have objections to the facts contained in the criminal history portion of the report and I believe particularly those were paragraphs 30, 31 and 48.

THE COURT: The criminal history, were obtained, I think what you contended was that the circumstances should be removed from the presentence report unless they were obtained from the charging document, the plea agreement, or a transcript of the colloquy?

MS. CALL: Yes, Your Honor, and that's based on the Supreme Court case of Shepard versus United States, where the Court set forth the documents that are to be used in determining prior predicate offenses, and the Court in that case limited it to certain readily available court documents and excluded police reports in part, I believe because the Police reports only up to a certain level of probable cause rather than any judicial standard required for a conviction or for a finding by a court, and also that those facts can be notoriously unreliable if the charging document and the plea are inconsistent with each other. That is, what the arrest is for may be different from the charge, which may be ultimately different from the plea.

THE COURT: What says the government?

MR. TALBOT: Ms. Call is correct based on Shepard. Those factual scenarios should be removed from the presentence report.

THE COURT: I think on one he was—on paragraph 48 he was scored three points, was he not, Ms. Call?

MS. CALL: Yes, Your Honor.

THE COURT: And the other two, I don't believe he was scored anything?

MS. CALL: Yes, Your Honor, because those after—aged out, the prior convictions from 1985 and 1986.

MR. TALBOT: Right. And I guess my position, if I'm hearing Ms. Call correctly, is it's not the existence of the charge or the points, it's that she's objected to it. She's objecting to the description of how he committed the crime.

THE COURT: All right. You're not objecting to the three points, are you, or are you objecting to the three points as well, Ms. Call?

MS. CALL: No, there's no objection to the scoring of the offense. It's the conduct that's alleged.

THE COURT: Just the conduct there. And you have no objection to that?

MR. TALBOT: No, I think that's a correct application.

THE COURT: Mr. Anderson, would you have any objection if we leave that language then?

PROBATION OFFICER ANDERSON: Your Honor, the probation office left the language in after reviewing Shepard and then reviewing the guidelines, and we believe that it was appropriate to include the alleged circumstances in the report, although would agree that those circumstances cannot be used to establish the particular conviction is a qualifying conviction under the Armed Career Criminal Act.

THE COURT: Well, thank you for that additional information, Mr. Anderson. However, since there's no objection from the government and—I think that it is appropriate to go ahead and delete that language. So based on that, I will go ahead and delete the language, the circumstances of the prior offenses, and we'll delete it from paragraphs 30, 31 and 48. That is, he will still be scored the three points that were scored on paragraph 48.

Okay.

Any other factual objections?

MS. CALL: No, Your Honor, no other factual issues.

THE COURT: Now, how about objections to the application of the guidelines?

MS. CALL: Yes, Your Honor, we do have the objections to the calculation of the guidelines.

THE COURT: All right, go ahead.

MS. CALL: Beginning, Judge, I believe it's in paragraph 24 where the presentence investigation asserts an enhancement under the Armed Career Criminal Act, we have two objections to that portion. The first is constitutionally. And first I will say that I've tried to acknowledge in my written objections, and it is stated in the addendum that we understand that Almendarez-Torres, the Supreme Court precedence from 1998, has not been explicitly overruled, but do maintain this objection to preserve further appeal or any other further developments that may exist from the Supreme Court.

I would note as recently as 2005 in the Shepard case, which is United States—I'm sorry, Shepard versus United States, at 125 Supreme Court 1254, that Justice Thomas restated his regret, I guess one could say, for joining in Almendarez-Torres. And in his concurring opinion in Shepard, he said Apprendi versus New Jersey and its progeny prohibit judges from making a finding that raises a defendant's sentencing beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. And this is all, Judge, at page 1263 of the opinion. That sentence he quotes there is from United States versus Booker. Justice Thomas continues and says, yet that is what the Armed Career Criminal Act, 18 U.S. Code 924(e) per-

mits in this case—he's referring to the petitioner Reginald Shepard—and states that he pled guilty to being a felon in possession of a firearm, in violation of 18 U.S. Code, 922(g)(1), which exposed him to a maximum sentence of ten years under 924(a)(2) and a federal sentencing guideline range of 30 to 37 months. However, 924(e)(1) mandated a minimum 15-year sentence if Shepard had three previous convictions for a violent felony or serious drug offense. Shepard has never concealed that his prior state court convictions qualify as violent felonies or serious drug offenses. Even so, the Court of Appeals resolved this contested fact by ordering the District Court to impose the enhancement.

And that is exactly the circumstance that Mr. Johnson stands before the Court. At the change of plea the question that came to him as part of the factual basis in the elements was, prior to possessing the ammunition at issue in this case, in August of last year, had you been convicted of any felony. There was no admission by Mr. Johnson that he had either a particular felony offense as described in the presentence report, or that such an offense was a predicate as defined by the Armed Career Criminal Act.

Judge, Justice Thomas continued on to note that the constitutional infirmity of 924(e) as applied to the defendant Shepard made, he thought, the court's decision an unnecessary exercise. In essence, he's saying that it doesn't matter what documents you can say that you may rely on, because it only depends on what facts were proven to the jury, where admitted by the defendant, and that the court's intervening precedents that had been decided, including Apprendi, Booker, Cunningham, have said that is unconstitutional in the case. And he noted that many

defendants had been sentenced unconstitutionally, although they did not take up in Shepard the issue of Almendarez-Torres continuing viability. He said innumerable criminal defendants have unconstitutionally been sentenced under the flawed rule of Almendarez-Torres, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond a reasonable doubt requirements.

And I think that constitutional infirmity that Justice Thomas was talking about applies directly to Mr. Johnson. As I said, I do know that the case—that the Supreme Court itself has not overruled that, but I believe even the Eleventh Circuit has noted that there are questions as to its continued viability. And for that reason, Judge, we do note the objection and maintain it, as I said, for further appeal and for further developments by the Court.

The second objection I have, Judge, to the statutory Armed Career Criminal itself is that this is a violation of the Eighth Amendment which guarantees the right to be free from cruel and unusual punishment. In this case the Armed Career Criminal Act provides no recourse to challenge any former conviction, and that's in contrast to the drug statute which provides for sentencing enhancements but allows the opportunity to challenge. The Armed Career Criminal Act doesn't provide any review like that.

Second, the Armed Career Criminal Act, unlike either career offender or other enhancement provisions, provides no limit. And as the Court has seen from the two convictions that we talked about in paragraphs 30 and 31, those are 21 and 22 years old,

and yet they are listed as prior predicate offenses in this case.

And third, Judge, the reason I think it's an Eighth Amendment violation is this is only an ammunition case versus a firearms case, and so there wasn't even an admission that he possessed the dangerous weapon itself.

So, Judge, those are the objections that I have to, in essence, I guess, the Armed Career Criminal act itself. I also have an objection to its application to Mr. Johnson's case, in that the conviction in paragraph 48—40, I'm sorry—the felony battery conviction, should not be counted as a predicate offense. And the reason for that, Judge, is that the statute, much like the question in Taylor and Shepard, where the question is what is a burglary, the question here would be what is a battery. In Florida state court a battery can be either a striking or a touching, and so it's not clear from either the charging document or the statutory definition of felony battery in state court, whether or not it was one that had as an element the use, attempted use or threatened use of physical force against another.

And I provided to Mr. Talbot earlier, and I have a copy for the Court and for probation, a decision in the Fourth Circuit from 2006 called United States versus Simms.

May I approach, Your Honor?

THE COURT: Yes, you may.

MS. CALL: Simms is a case like many in the law that has both favorable and unfavorable language. The issue in Simms was whether or not a prior conviction under a Maryland statute for battery con-

stituted a violent felony. And the Court noted that the—a conviction for a battery in Maryland was an unusual situation, in that the offense could be committed in several ways, some of which required the use, attempted use or threatened use of physical force, and some of which did not. And they cited a Maryland case that noted that the conviction could include kissing without consent, touching, tapping, jostling or throwing water upon another.

I think that's very similar to the statute that is at issue here in Mr. Johnson's case, in that the Florida conviction covers both striking and touching, and that without further delving into the underlying conduct, there are no readily provable court documents that show what Mr. Johnson's conviction was in fact for.

In Simms, the Fourth Circuit found that the underlying charging document in the Maryland case did define what type of conduct had—that Mr. Simms had actually, I guess, performed during his underlying conviction.

In contrast, the only information we have here is that Mr. Johnson was charged with having a previous battery conviction and that he did actually and intentionally touch or strike another person against that person's will. And they defined that in–contrary to the provisions of 784.03, subparagraph two.

So as noted in the addendum, the probation officer reviewed the Court file and did not find any of the other defined documents, such as a plea agreement, a transcript, or any judicial facts that would assert whether or not Mr. Johnson had in fact been convicted of a type A or type B conviction. And for that reason, Judge, I don't believe that that conviction

should be held as a predicate. And if it's not, then he does not qualify as an armed career criminal.

THE COURT: All right, why don't I hear a response from the government. Those are all your arguments, correct, Ms. Call?

MS. CALL: Judge, yes, those are the issues that we have and those are set forth in the addendum.

THE COURT: That's what I thought. Okay.

Would you like to respond to that, please?

MR. TALBOT: Yes, Your Honor. And for purposes of the record, what I'd like to do is introduce some documents into evidence to be a part of this record.

THE COURT: Okay.

MR. TALBOT: First I would offer is a conviction for aggravated battery. It is a certified conviction from the state court.

MS. CALL: Judge, I would note that that's the 1985 case. It's not the one that we've objected to here.

THE COURT: Okay.

MR. TALBOT: That could be Government 1.

THE COURT: All right. Any other objection to that,

Ms. Call?

MS. CALL: No, Your Honor.

THE COURT: All right, Government's Exhibit 1 is received into evidence.

(Government's Exhibit 1 received in evidence.)

MR. TALBOT: Government's 2 is a certified copy of the burglary of a dwelling conviction. That's the '86 conviction number. Also attached to this exhibit is a

certified copy of the charging information which sets out the charge of burglary of a dwelling.

MS. CALL: No objection.

THE COURT: All right, Government's Exhibit 2 is also received into evidence.

(Government's Exhibit 2 received in evidence.)

MR. TALBOT: Exhibit 3 is a certified conviction—this is a felony battery conviction that Ms. Call has raised an issue.

MS. CALL: No objection.

THE COURT: You said Exhibit 3?

MR. TALBOT: Yes, Your Honor. And then Exhibit 4 I would offer into evidence at this time is the—it is not a certified copy. We actually had it faxed over this morning. It's a copy of the information charging document for the—for Exhibit 3. It's just that I don't have a certified copy of it.

MS. CALL: No objection.

THE COURT: All right. Thank you. Government's Exhibits 3 and 4 are received into evidence.

Let me just take a look at those for a moment, Mr. Talbot, before you begin.

(Government's Exhibits 3 and 4
received in evidence.)

MR. TALBOT: Yes.

THE COURT: All right, you may proceed, Mr. Talbot.

MR. TALBOT: Your Honor, and I will—let me state at the outset that a continuance of this may be necessary to obtain all the documents that are out there. Typically cases—and I—from experience, the cases

from the '80s, the documents are very limited. This felony, felony battery conviction, however, we may be able to obtain additional documents to provide to the Court, should, that be necessary. And it may be that in an abundance of caution that it is necessary to make a more complete record, as no doubt I'm sure Ms. Call will ask the Eleventh Circuit to review whatever sentence is imposed in this case. But I want to at least make some argument and look at some things.

First of all, the case that Ms. Call cites to, and I think this actually may help Ms. Call, although it's an unpublished opinion which I assume she probably is aware of, the Eleventh Circuit actually has cited to the Simms case in an unpublished opinion. It's U.S. versus Wright, it's a 2006 opinion. It is unpublished. That's 181 Fed Appendix 914. And they did cite to that for at least the premise that not every battery is a crime of violence.

My argument in this case is that a felony battery is by itself a different type of battery, because the person committing the crime, number one, is in a different posture. It's kind of akin to battery of a law enforcement officer, which pretty consistently—I'm unaware of anytime that it's been held otherwise—any time there is a battery on a law enforcement officer, this is a crime of violence and h. s consistently been held to be a crime of violence both under career offender and under armed career criminal. What makes battery of a law enforcement officer different from a battery is the fact that the victim of the battery is a law enforcement officer and really nothing else. What makes—so in that case it's the victim that defines the crime as enhanced. Here, it's actually the defendant that defines—the crime is enhanced because it's the person committing the battery that is

viewed in a more—as a more dangerous individual based on the prior conviction for battery, in this case a prior conviction for aggravated battery which the Court has received.

So in that respect, when the Simms case says that not every battery—and the Eleventh Circuit says not every battery is a crime of violence. This is not just a battery. It's a felony battery, and it's different in two respects, but one is that it is someone who has that prior conviction. And I think that's of significance when looking at 924(e), to decide whether this is a crime of violence.

Now, in terms of the elements of the offense, and this is—this is where we—additional information may be necessary. The charging document in this case basically tracks the language of the statute, which is that they were—did intentionally touch or strike—I may have given—

THE COURT: Do you need the—

MR. TALBOT: I may have given away every copy. Ms. Call is going to let me peek at hers.

THE COURT: It's okay because I've got it here.

MR. TALBOT; It just tracks the language, did actually and intentionally touch or strike the victim against her will, and it cites the prior conviction. So arguably the information does not—I mean it just simply tracks the language of the statute. However, I think at least an argument could be made that under Florida, that the battery contains all the elements we need of 924(e).

There is a case in a—and I will candidly admit that my research was rather hastily done this morning, but I did stumble across a case, it was an out of dis-

trict case and it was a nonpublished case out of the Seventh Circuit, but the prior convictions that it cites—and the case I'm looking at is U.S. v. Lowe, it's 79 Fed Appendix, 2011, it's a 2003 case. The defendant in that case had convictions for robbery, battery, burglary, and they were all in Florida.

So this Court, looking at a Florida battery conviction, found that it was a crime of violence. The problem that this case doesn't answer is it doesn't tell me what the felony battery was. It just calls it battery. So I'm at a bit of a loss in terms of being able to say that that conclusively answers our question.

THE COURT: How long would it take to obtain this additional information, Mr. Talbot? I'm a bit uncomfortable myself.

MR. TALBOT: Right. And where—what I would like to do is to have—I'm going to say—and I say I. It may be Mr. Henry that's standing here when this comes back, but certainly I will assist him in this. And I am familiar with this case. I think I actually indicted it. I think it's going to take us at least 30 days. It could take longer.

What we're going to need to do is I'm going to actually go to state court and look at the clerk's file for appropriate Shepard-type documents. And candidly, I don't—I wouldn't have been able to do that before coming here today anyway.

The other thing that I would like to do is to make an effort to try and obtain a transcript of the plea colloquy and of the sentencing. Both those are good Shepard documents that at least show the items that I could use, if I could obtain them. I should be able to obtain them because the conviction is not that old.

And so, Your Honor, I would make an ore tenus motion to continue that to give us a chance to find more information. Additionally, you know, if Ms. Call's argument is successful, there may be some additional matters that we would want to present to the Court under 3553 factors that may actually—may actually ask the Court for a higher sentence than the guidelines call for, so—

THE COURT: Ms. Call, would you object if I continue this sentencing to a date after July 1st?

MS. CALL: I do object, Your Honor. The Court—the probation officer disclosed the presentence report and asked for objections to be filed. I sent my letter to Mr. Anderson and copied the government attorney on May 3rd. The disclosure of the final PSI to me was dated May 11th, so these are not issues that I came forward today and said, Judge, I have late-breaking argument. This was all well set out in both my letter and the addendum, and Mr. Johnson was prepared to go forward today and wants to have this resolved. He has been in custody continuously since this offense, since August, and it's quite a long time to have this weighing on him as to whether this case was going to be resolved in state court, federal charges, and what sentence he was likely to receive.

THE COURT: Well, I'm going to overrule your objection. I personally think that the continuance is in everybody's best interest so that we can resolve the matter while having all the information at our disposal available to us. So I'm going to go ahead and continue the case for a date after—or continue the sentencing for a date after July 1st. Would that give you enough time, do you think, Mr. Talbot?

MR. TALBOT: We will make every effort to make that happen as quickly as possible. And if for some reason we are unable to obtain the documents, we will let the Court know before the sentencing date.

THE COURT: And we need to work around Ms. Call's schedule as well because, you know, she's—there are probably eight—at least eight people here, I imagine, on the defendant's behalf. So, you know, they're going to need to come back, and so obviously we need to accommodate their schedule as well as Ms. Call's schedule.

So right now the date we're looking at is July 12th at 2:00 p.m. And please let me know if that does not—

MS. CALL: Judge, I already have a hearing set with this Court at that time.

THE CLERK: 3:00 p.m., Your Honor.

THE COURT: 3:00p.m

MS. CALL: Yes, ma'am, July 12th at 3:00 p.m.

THE COURT: Well, thank you very much. I appreciate your checking with them and the folks agreeing to come back.

Anything else we need to accomplish today, Mr. Talbot?

MR. TALBOT: No, Your Honor.

THE COURT: Okay. Ms. Call, thank you. We stand adjourned.

COURT SECURITY OFFICER: All rise. This Court is now, in recess.

(Proceedings concluded at 11:43 a.m.)

* * *

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

Division Cr-C

Case Number: 16-2002-CF-4806-AXXX-MA

___Probation Violator
_X_ Community Control Violator
____Retrial
___Resentence

STATE OF FLORIDA Filed May 16, 2003

v.

CURTIS DARNELL JOHNSON
Defendant

COMMUNITY CONTROL OF 8-16-02
SET ASIDE & REVOKED

JUDGMENT

The defendant CURTIS DARNELL JOHNSON, being personally before this court, represented by M. Bernstein, the attorney of record, and the state represented by P. Johnson, and having

___been tried and found guilty by jury/by court of the following crime(s)

_X_ entered a plea of guilty in the following crime(s)

___ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Numbers	Degree of Crime	Case Number	OBTS Number
	Felony Battery (one prior)	784.03(2)-3	3° Felony		

X and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (ch. 794), lewd and lascivious conduct (ch. 800), or murder (s. 782.04), aggravated battery (s. 784.045), burglary (s. 810.02). carjacking (s. 812.133), home invasion robbery (s. 812.135), robbery (s. 812.13), or robbery by sudden snatching (s. 812.131) or any other offense specified in section 943.325, the defendant shall be required to submit blood specimens or other approved biological specimens.

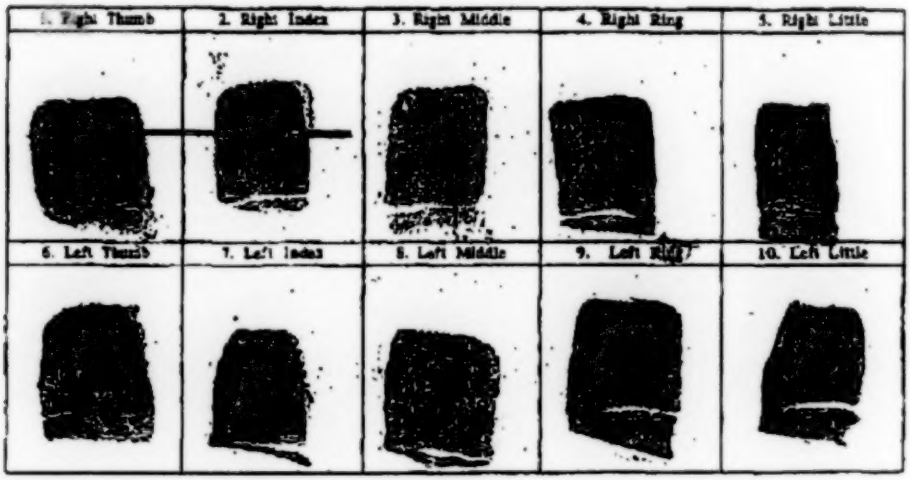
and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

Imposition of Sentence Stayed and Withheld

(Check if Applicable)

The Court hereby stays and withholds the imposition of sentence as to count(s)__and places the Defendant on probation/ community control for a period of_____under the supervision of the Department of Corrections (conditions of probation/ community control set forth in separate order.)

FINGERPRINTS OF DEFENDANT



Fingerprints taken by: S. Hills 9467 Baliff
Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, CURTIS DARNELL JOHNSON, and that they were placed thereon by the defendant in my presence in open Court this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 16, day of May, 2003

/s/ [Illegible]
Judge

CHARGES/COSTS/FEES

The defendant is hereby ordered to pay the following sums if checked:

_X_ $50.00 pursuant to section 938.03, Florida Statutes (Crimes Compensation Trust Fund).

_X_ $3.00 as a court cost pursuant to section 938.01(1), Florida Statutes (Additional Court Cost Clearing Trust Fund).

__ $2.00 as a court cost pursuant to section 938.15, Florida Statutes (Criminal Justice Education by Municipalities and Counties).

__ A fine in the sum of $____pursuant to section 775.0835, Florida Statutes. (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes are to be recorded on the sentence page(s).)

__ $20.00 pursuant to section 938.09, Florida Statutes (Handicapped and Elderly Security Assistance Trust Fund).

__ A 10% surcharge in the sum of $____pursuant to section 938.11, Florida Statutes (Handicapped and Elderly S Security Assistance Trust Fund).

__ A sum of $____pursuant to section 938.27, Florida Statutes (Prosecution/Investigative Costs).

__ A sum of $____pursuant to section 938.29, Florida Statutes (Public Defender Fees).

__ $15.00 pursuant to 938.13, Florida Statutes, Misd. convictions involving drugs or alcohol.

_X_ $200.00 pursuant to section 938.05, Florida Statutes (Local Government Criminal Justice Trust Fund).

__ A sum of $_____pursuant to 938.04, Florida Statutes (additional cost - 5% of fine).

__ $135.00 pursuant to section 938.07, Florida Statutes (EMS - DUI cases).

__ $100.00 pursuant to section 938.25, Florida Statutes, (FDLE Operating Trust Fund).

__ A sum of $_____pursuant to 938.23, Florida Statutes, (Grants For Alcohol & Other Drug Abuse Program - Drug Abuse Trust Fund).

__ A sum of $_____pursuant to 939.18, Florida Statutes, (Assessment of Additional Court Costs for Court Facilities - not to exceed $150.00.

__ Restution in accordance with attached order.

_X_ A sum of $20 pursuant to 938:06, Florida Statutes, (Assessment of Additional Court Costs for Crime Stoppers Trust Fund—not to exceed $500.00.

_X_ A sum of $3.00 pursuant to 938.19, Florida Statutes, (Assessment of Additional Court Costs - Duval County Teen Court Trust Fund).

___ A sum of $201.00 (Domestic Battery surcharge)

___ Other _____

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this _16_day of _May_ 2003.

[Illegible]
Judge

SENTENCE

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record M. Bernstein, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

___ and the court having on _____ deferred imposition of sentence until this date.

___ and the court having previously entered a judgment in this case on _____ now resentences the defendant

_X_ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court That:

___ The defendant pay a fine of $____ pursuant to section 775.083, Florida Statutes plus $____ as the 5% surcharge required by 938.04, Florida Statutes.

_X_ The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (Check one; unmarked sections are inapplicable):

____For a term of natural life.

_X_For a term of _3_ years

____Said SENTENCE SUSPENDED for a period of _____subject to Conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____Followed by a period of _____on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____However, after serving a period of _____imprisonment in_____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____under supervisions of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

OTHER PROVISIONS

Retention of Jurisdiction	_____The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.
Jail Credit	__X__It is further ordered that the defendant shall be allowed a total 140 days as credit for time incarcerated before imposition of this sentence.
Prison Credit	_____It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to re-sentencing
Consecutive/ Concurrent As To Other Counts	_____It is further ordered that the sentence imposed for this count shall run (check one)_____ consecutive to ____concurrent with the sentence set forth in count _____ of this case.
Consecutive/ Concurrent As To Other Convictions	__X__It is further ordered that the sentence imposed for this count shall run (check one)_____ consecutive to __X__concurrent with the following: (check one) ____any active sentence being served __X__specific sentences 16-2002-CF-9163-AXXX-MA and 16-2003-CF-2904-AXXX-MA

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from his sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends_____

_____

_____

_____

_____

DONE AND ORDERED in open court at Jacksonville, Duval County, Florida, this 16 day of May, 2003.

[Illegible]
Judge

* * *

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

Fall Term, in the year two thousand one

Case Number: 02-04806-CF
Division CR-C/SAD

May 6, 2002

STATE OF FLORIDA

vs.

CURTIS DARNELL JOHNSON

INFORMATION FOR

FELONY BATTERY
(ONE PRIOR)

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

HARRY L SHORSTEIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, charges that CURTIS DARNELL JOHNSON on the 9th day of March, 2002, in the County of Duval and the State of Florida, having been previously convicted of battery on July 25, 1989, did actually and intentionally touch or strike Kavetta White Julien against the will of said person, contrary to the provisions of Section 784.03(2), Florida Statutes.

Harry L. Shorstein, State Attorney

By: /s/ [Illegible]
Assistant State Attorney
Fourth Judicial Circuit of Florida,
in and for Duval County

* * *

IN THE UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

Case No. 3:06-cr-327-J-33HTS

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

CURTIS DARNELL JOHNSON
Defendant.

July 12, 2007

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

* * * *

PROCEEDINGS

(Defendant present.)

COURT SECURITY OFFICER: All rise. This Honorable Court is now in session. You may please be seated.

THE COURT: We're here for the continuation of the sentencing in United States versus Curtis Darnell Johnson, case 06-criminal-327-J-33HTS.

Would counsel please state their appearances. Mr. Talbot?

MR. TALBOT: Frank Talbot for the United States.

THE COURT: Thank you, Mr. Talbot.

Ms. Call?

MS. CALL: Lisa Call on behalf of Mr. Johnson, and this is he at the table with me.

THE COURT: Thank you, Ms. Call.

And we have Mr. Anderson from the probation office.

This hearing originally took place on May 24th, 2007 and then it was continued to today's date. And I know that, Mr. Talbot, you were going to go ahead and get some additional information. I think when we left it you were going to go to the state court and look at the clerk's files for appropriate documents that were in compliance with the Shepard case, and I think in addition to that you were going to try to obtain the transcript of the plea colloquy and of the sentencing concerning Mr. Johnson's criminal history. So do you want to go ahead and bring this up-to-date?

MR. TALBOT: Yes, Your Honor. I was successful in obtaining—and it's actually all at the same hearing—the plea colloquy and the sentencing all occurred on August 16th, 2002, before Judge Dearing. And I would offer that, although I'll argue why it may not necessarily mean much to us in this case, but I at least do want to make it part of the record, if there's no objection.

MS. CALL: No objection, Your Honor.

MR. TALBOT: So this will be number 3

THE CLERK: Right, it was 1 and 2.

THE CLERK: Actually for today it would start as 1. It's a new date.

THE COURT: So this will be Government's Exhibit 1, is received into evidence. And there is no objection from the defense, is that correct, Ms. Call?

MS. CALL: It is, Your Honor.

THE COURT: All right. Just give me one moment, Mr. Talbot, to take a look at this.

Okay. All right, I've had the opportunity to review the transcript of the proceedings before Judge Dearing on Friday, August 16th, 2002, here at the Duval County Courthouse.

All right, go ahead. Continue, Mr. Talbot.

MR. TALBOT: And, Your Honor, the last time we were together, and as I approached this from sort of two standpoints. Number one, do we even reach kind of a Shepard need to be looking at the documents. And I think so far we have the certified conviction, I believe we have the information or charging document, and now we have the transcript. So we—I don't want to say we've exhausted every possible single Shepard document, but we've hit certainly the big three, if there are three that can be considered more important than others.

THE COURT: And just so we're clear, we're talking about the felony battery in case—let's see, the May 16th, 2003 felony battery conviction in case number 16-2002-CF-4806 again in the Circuit Court, Fourth Judicial Circuit in Duval County, May 16, 2003?

MR. TALBOT: Yes. In doing some additional research on this, it's going to be the position of the United States, at least in terms of this felony battery, that we actually don't even reach a Shepard-type decision. And I have two cases that I want to discuss and I'll provide a copy to the defense counsel, provide clean copies for the Court.

I believe the last time we were together I at least pointed out that battery on a law enforcement officer is traditionally treated as a crime of violence, and

that is what the Glover case analyzes. And on page 6 of that opinion as it's printed out, the Court goes through an analysis under 4B1.2, which is the definition of a crime of violence for the guidelines.

At the first portion of that analysis, prong 1 is that the crime has, as an element, the use, attempted use or threatened use of physical force against the person of another. That is exactly the same language from 18 USC 924(e), at least on the first prong.

The second prong is a little different, but we really are dealing with the first prong in Glover and in this case.

THE COURT: Okay.

MR. TALBOT: The Court goes on, essentially, to analyze battery as defined under Florida law. So we have a case in Glover where they're specifically looking at the Florida Statute for battery. And in looking at that statute, they reach the conclusion that the actual and intentional touching or striking of another person, or the intentional causing of bodily harm to another person, that that meets under the guidelines 4B1.2, the element of use or attempted use of—or threatened use of physical force against the person of another.

So they don't—they don't even make the decision based on—and I think I had mentioned before, and now stand corrected, that perhaps battery on a law enforcement officer is a crime of violence because of who the intended victim is, a law enforcement officer. That's not how they reached their conclusion. They reached their conclusion simply by looking at the elements of battery, and in this case under Florida law, and they don't go any further than that. And that appears to be how they reached the conclusion.

So it really doesn't matter who the victim is, whether it's a law enforcement officer, whether it's a person in a detention facility and—so my argument is that, therefore, any time we have a battery under Florida law, we have a crime of violence, because we're going to have a crime that has as an element the use, attempted use or threatened use of physical force against the person of another.

The Walker case, which is a slip copy case, it's not an—not currently a published opinion, but it cites to the decision in Glover as binding precedent. And there is a good discussion on the first page and over on the second page, and it's—I'll just read from the bottom of page 1 going over, it says, "We have directly addressed this issue and the District Court did not err in finding battery on a law enforcement officer under Florida law is a crime of violence. Contrary to Walker's contentions, Shepard does not alter this conclusion, as it merely limited the types of evidence the District Court may consider in determining the nature of a prior conviction. Unlike in Shepard, the district court in this case had to look no further than the fact of conviction to determine Walker was a career offender."

So that is—and that is what the United States is going to argue is what we have here. We have a felony offense, clearly. It is a battery offense, and based on the prior reasoning in Glover and in—again, followed in Walker, it does not matter who the victim is, it just—what matters and what is important is that it is a battery. And so whether it's a battery on a law enforcement officer, battery in a detention facility or felony battery, in this case, regardless of who the defendant, who the victim is, if we have the elements

of battery, we do have a crime of violence and we do not engage in a Shepard inquiry.

THE COURT: So it's your position then that any time that you have a felony battery as opposed to a misdemeanor battery, it would automatically qualify as a violent felony?

MR. TALBOT: Yes, Your Honor, based on the way the Court reached their decision in Glover, it was not that they reached their decision because it was necessarily a law enforcement officer. They reached their decision on an analysis of the provisions of battery under Florida law. And the only difference, the only additional element of battery of a law enforcement officer has nothing to do with violence, it just has to do with who the victim is. It's the elements of misdemeanor battery, plus your victim is a law enforcement officer.

THE COURT: Let me make certain then that I completely understand your argument. I'm looking at the Glover decision, which you gave me and indeed you referred earlier to page 6.

MR. TALBOT: Yes.

THE COURT: Where it says on page 6, it says, "Guidelines section 4B1.2 defines crime of violence as any offense under federal or state law punishable by imprisonment for a term exceeding one year that has an element"—excuse me, "that has as an element the use, attempted use or threatened use of physical force against the person of another." And that's section 4B1.2 of the sentencing guidelines.

The Court then goes on to say, "Under Florida law, battery occurs when, a person actually intentionally touches or strikes another person, or; 2, intentionally

causes bodily harm to another person." And it cites the Florida Statute 784.03 and 784.07. Then it goes on to discuss battery on a law enforcement officer.

So it's your position that that is the reasoning of the Eleventh Circuit with respect to what a crime of violence is, and in this case because it's a felony battery, consequently based on the reason of the Eleventh Circuit, it is automatically defined as a crime of violence under law?

MR. TALBOT: Yes, they would make the same analysis because the battery portion is identical. The only difference between this case and battery on a law enforcement officer is the additional element in this case is a prior conviction on the defendant.

The only additional element in battery on a law enforcement officer is that your victim is a law enforcement officer. Neither one of those elements has any substantive meaning, in terms of adding more violence, although an argument could be made there, but that isn't—that does not appear to be why the Eleventh Circuit reached their decision. They reached their decision analyzing the statute of battery and they give the misdemeanor definition of battery.

THE COURT: Anything in a recent Eleventh Circuit opinion, that James case, I think is what it was called, that is helpful here? That's the—I'm sorry, it's a Supreme Court decision which upheld an Eleventh Circuit court opinion that attempted burglary qualified as a violent felony for purposes of sentence enhancement. Was there anything there that's helpful to your position?

MR. TALBOT: I don't believe so, because of the difference in the—that would dropping down and

looking at—more looking at the second part of 924(e), whereas we're really in the first part.

THE COURT: It's your position we don't get there. I mean what we're talking about is the first part of 924.

MR. TALBOT: Yes, and that we—even though I have introduced documents that clearly are aimed towards Shepard, it's the position of the United States that that really is unnecessary as—well, essentially, we would just stop with the certified conviction for felony battery, and that would be the end of the inquiry, because of the Eleventh Circuit's prior decisions related to Florida battery convictions that are qualified as felonies.

THE COURT: Okay. All right, I understand your argument. Thank you very much, Mr. Talbot.

Ms. Call, do you wish to be heard on this?

MS. CALL: Judge, since this is the continuation of the prior sentencing, we maintain all of the objections that were made at the initial hearing, including those set out in my May 3rd letter to the probation officer, which is the addendum that states the objections.

But as to addressing simply the issue of the felony battery conviction, and I believe that's Paragraph 48 of the presentence report, I disagree with Mr. Talbot's conclusion that Glover and its subsequent case define the issue. In both of those cases it was dealing with the felony statute that dealt with battery on a law enforcement officer. Those are the statutes that deal with a protected class of persons.

The felony battery that we're dealing with here is a felony conviction only because of the prior conviction, so it's really bootstrapping a felony based on a mis—

it would have been a misdemeanor but for the prior conviction. So I think there is a difference between saying that there's and battery and a battery on a law enforcement officer.

I also think that both Glover and its subsequent case are merely conclusions based on the title and they don't address the argument that I've presented here, which is that the Florida battery statute itself is much like the burglary statutes that led to Taylor and Shepard. It's ambiguous, because just like the statute says that burglary is a predicate offense, Taylor and Shepard have clarified that it's not every single offense that's titled as a burglary. And similarly, I don't think that battery itself, just the title of the offense or the title of the conviction, is itself definitive. Neither of these cases that are quoted today address the issue that they can be done in nonviolent ways, the striking versus touching. So I don't think that it's dispositive of the argument that we've presented here today.

It also then, it appears to me, creates a circuit split. During the last hearing we had talked about the Fourth Circuit case, I believe titled Simms, that recognized that Florida's battery statute had both the touching versus striking and created an ambiguity, which is not addressed here.

Also, Judge, we do maintain then that this is still a violation of the Almendarez-Torres and still requires the Court to engage in judicial fact-finding beyond that permitted under the Sixth Amendment.

THE COURT: Well, I'm not sure that you've answered, Ms. Call—and I'll give you the opportunity to do that—the position of the probation officer, which quite frankly I think is well reasoned, and let me just read to you what he says here with respect to Para-

graph 40, and this is in the addendum dated July the 3rd.

"The probation officer contends that the statutory definition of felony battery, Florida Statute 784.03, cannot be interpreted in any way other than as a violent felony, as defined at 18 USC Section 924(e)(2)(B). The probation officer contends that intentionally touching another person against their will does involve physical force. One cannot physically touch or be physically touched without the use of force. Furthermore, the probation officer contends that touching someone against their will does in fact present a serious potential risk of physical injury."

How do you argue around that analysis which, you know, quite frankly, seems right on target to me?

MS. CALL: Judge, I guess what they're saying is that any touching is by definition physical force, but that would be directly contrary to the reason that the Florida Statute would have both a striking and a touching. If all touching is itself violent, there wouldn't be a need to have an "or" to the underlying statute. But in fact, there are alternative ways. The definition of striking can be one that necessarily implies some sort of force. Touching does not. And I think just by the definitional terms, strike would be the definition to hit sharply with the hand, the fist, a weapon, to inflict a blow. Touching does not necessarily require those. And I don't think that touching also requires a direct, either through the use of some item to touch someone else.

THE COURT: Well, let me see if there's a response to that by Mr. Talbot and also allow the probation officer, Mr. Anderson, to address that if he so wishes.

Mr. Talbot, is there anything you'd like to say in response?

MR. TALBOT: No, Your Honor, I don't have any response to that.

THE COURT: Okay. Anything else that you'd like to add, Mr. Anderson?

PROBATION OFFICER ANDERSON: Nothing additional to what is in the addendum.

THE COURT: Okay. Anything you'd like to say with respect to the Almendarez argument, Mr. Talbot, that Ms. Call touched upon?

MR. TALBOT: No, Your Honor.

THE COURT: And that is about judicial fact-finding.

MR. TALBOT: I think she has preserved her objection there. It is—it is still good law for us, and the Court can make and should make the determination, as to the prior conviction, of whether or not it's a crime of violence.

That's a decision for the judge to make and not for the jury.

THE COURT: Anything further on that particular issue, Ms. Call?

MS. CALL: No, Your Honor, no other legal argument.

THE COURT: Okay. Well, I've reviewed the exhibits that have been introduced by the government, both at this hearing, the transcript of the August 16th, 2002 hearing as well as the other exhibits that were previously presented to the Court, and I conclude that it is indeed appropriate to consider the fe-

lony battery as a crime of violence. I say that primarily based on the reasoning that I referred to earlier, as well as the arguments that were made by Mr. Talbot. So I believe it is appropriate to consider the felony battery as a violent crime for purpose of sentence enhancement, and so therefore it was appropriately characterized as such by the probation officer in his report. So consequently, Ms. Call, any objections that you have based on that are hereby overruled.

All right, let me go ahead and turn to Mr. Talbot. I'm not sure, Mr. Talbot, what is the best way to proceed now. And quite frankly, I probably need to go back and review my notes with respect to where we left off. Just give me one moment.

Okay. I think what we did last time, we really were more or less stopped on this point, and that is on the point of whether this was considered a crime of violence or not. So I think probably in an abundance of caution I'll go ahead and go through the colloquy that I normally go through again unless you, Mr. Talbot, don't think it's necessary to do that.

MR. TALBOT: Your Honor, I think that's a good idea—

THE COURT: Okay.

MR. TALBOT:—to go through that. I honestly can't remember exactly where we left off. Probably somewhere with objections to the PSR.

THE COURT: I have think that might be the best thing to do. So Ms. Call, I'm going to go ahead and do that, just so the record is as clear and as straightforward as possible.

And again, I'm going through the new—let's see, there's the addendum to the presentence report prepared by the probation officer dated July 3rd, 2007, and then we have the—let's see, there was also a new report prepared as well, which is also dated July 3rd, 2007.

I don't believe there is anything in addition to that. All right. So I think that's what we have here. So I'm just going to go ahead, and just so that we have a clear record, go ahead and start from the beginning of the colloquy that I normally do.

Curtis Darnell Johnson, on January 24th, 2007, you entered a plea of guilty to Count 1 of the indictment charging possession of ammunition by a prohibited person, in violation of Title 18, United States Code, Sections 922(g) (1) and 924(e). The Court has accepted your guilty plea and adjudged you guilty of said offense.

We have now reached the stage in the proceedings where it is my duty to address several questions to you and your attorney and counsel for the government. And I'll start with Mr. Talbot.

Mr. Talbot, you have read the presentence report; correct?

MR. TALBOT: Yes, Your Honor.

THE COURT: Do you have any objections as to the factual accuracy of the report?

MR. TALBOT: No objections from the government.

THE COURT: Do you wish to make any objection to the probation officer's application of the guidelines?

MR. TALBOT: No objection to the guidelines.

THE COURT: All right. Ms. Call, have you had the opportunity to read and discuss with Mr. Johnson the presentence report?

MS. CALL: Yes, Your Honor.

THE COURT: Do you have any objections as to the factual accuracy of the report?

MS. CALL: The objections I have are attached to the addendum, Your Honor.

THE COURT: All right. And I have reviewed those and duly note your objections as outlined today, as well as what you have filed and what was previously presented to the Court in our May 24th hearing.

Do you wish to make any objections to the probation officer's application of the guidelines?

MS. CALL: As stated in the addendum, Your Honor.

THE COURT: Very good. Those are likewise noted.

The Court adopts the factual statements contained in the presentence report, as to which there is no objection. And as to the controverted factual statements, the Court adopts the position of the probation office as stated in the addendum, and the objections of Ms. Call are overruled. Therefore, the Court determines that the advisory guidelines are total offense level 30, criminal history category V, 180 to 188 months imprisonment, three to five years supervised release, $15,000 to $150,000 fine, restitution is not applicable, and a $100 special assessment.

Mr. Talbot, do you know of any reason why this Court should not now proceed with imposition of sentence?

MR. TALBOT: There is no legal bar to sentence.

THE COURT: Do you wish to make a statement to the Court with respect to what an appropriate sentence for this defendant would be?

MR. TALBOT: Your Honor, we are not asking for anything outside the recommended guideline range. I do recognize that that range is rather small, and of course recognizing the minimum mandatory sentence that must be applied as well.

THE COURT: All right. Thank you, Mr. Talbot.

Ms. Call, do you know of any reason why this Court should not now proceed with imposition of sentence?

MS. CALL: No legal bar, Your Honor.

THE COURT: Do you wish to make a statement or present any information in mitigation of the sentence? Your client is certainly welcome to testify or to present an argument to the Court, and you're also certainly welcome to present any witnesses or any other evidence that you would like to present.

MS. CALL: Thank you, Judge. There are several family members here and I'd like to recognize two of them to speak and then make my comments.

May I ask Ruby Johnson to come forward.

THE COURT: All right.

THE WITNESS: Good evening, Your Honor.

THE CLERK: Please state your full name for the record and spell your last.

THE WITNESS: Ruby Lee Johnson, J-o-h-n-s-o-n.

RUBY LEE JOHNSON, called as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MS. CALL:

Q. Mrs. Johnson, what is your relationship to Mr. Johnson?

A. He's my son.

Q. What did you want the judge to know this afternoon?

A. I. Just want the judge to know—excuse me—that he made a lot of mistakes, but I realize and I understand that raising him up by myself as a single parent, that I made some mistakes, because a lot of things that he needed in his life when he was growing up, it wasn't there. But I understand now that he is more mature, that he's grown up, he's the father of two, he has three grand kids, and I believe that with his freedom and other things that's offered to him, that he can become a respected and well man. And I'm getting old, I need my son. I'm 60, I just had my 60th birthday, and he wasn't there to give me a hug. And I just ask you, Your Honor, to just give him another chance. And this is so much that's offered, he realize now that there's other things that he can do and get involved in and become a wonderful citizen and a wonderful man.

MS. CALL: Thank you, Ms. Johnson.

THE WITNESS: Your Honor, can I ask one more question?

THE COURT: Uh-huh.

THE WITNESS: Can I give my son a hug?

THE COURT: You know, that's up to the Marshals Service and, you know, they're in charge of making certain that everything here is protected and—

THE WITNESS: Well, can I ask—

THE COURT: And I'm sorry, you're probably not going to be able to do that, okay.

THE WITNESS: I love you, son.

Thank you.

THE COURT: Thank you, ma'am.

MS. CALL: Judge, may I ask Anita Freeman to come up.

THE CLERK: Please state your full name for the record and spell your last.

THE WITNESS: Anita Felicia Freeman, F-r-e-e-m-a-n.

ANITA FELICIA FREEMAN, called as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MS. CALL:

Q. Ms. Freeman, what is your relationship to Mr. Johnson?

A. I'm his sister.

Q. And you and he have the same mother, Ms. Johnson?

A. Yes.

Q. You know that we're here today for a sentencing?

A. Yeah.

Q. What did you want the judge to know about your brother?

A. That he was trying to get his life together. He and I were trying to start a business that didn't really turn out well. We were just having a lot of financial problems and both of us were really, really depressed, but I know if things had gone a little better,

if I could talk to him, he never would have gotten in trouble, he never would have started drinking, because he was really, really excited about reestablishing a relationship with his son and his grand kids

And I'd like to ask Your Honor if you'll just give him a chance to get counseling or something.

Q. And Ms. Freeman, you have some other family members here in court today with you. Can you help me tell the judge who is here with you?

A. My other sister—other two sisters, Delores and Latania, my brother Michael and his wife, and my nephew.

MS. CALL: Thank you.

Judge, I think the other family members would continue to come up and tell the same things, that Mr. Johnson is a big part of their family and it's his brother, Michael Johnson, and his wife Tammy are here, Latania Johnson and Delores Freeman, his two sisters, and Lamar Belton, his nephew.

Judge, given the fact that the Court has overruled the objections that we made, it is a fairly narrow guideline range and a fairly substantial sentence that the Court is to begin with, since the lowest sentence is the 15-year minimum mandatory. I would ask the Court to consider that as a substantial, harsh penalty in this case.

Mr. Johnson is 38. A sentence like this will require more than ten years, probably, in custody, probably about 12, which would mean that he'd be away until he's almost 50. I think that that well satisfies all of the purposes of sentencing. It does reflect the fact that he has prior convictions that are scored in his

prior record. Those have already counted to assess him as being Category 5 on his criminal history score, so those matters are not disregarded in the calculation of the guidelines. And I think that the minimum mandatory is itself a harsh enough penalty.

THE COURT: Is there anything further, Ms. Call?

MS. CALL: Do you want to say anything?

DEFENDANT JOHNSON: Yeah.

MS. CALL: Judge, I think Mr. Johnson also had something.

THE COURT: Mr. Johnson, go ahead, sir.

DEFENDANT JOHNSON: First, I'd like to apologize for even being here, because at this point in my life I didn't think I'd never be facing this.

I'd like to apologize to my family because I know I have caused them a lot of grief, but I can only honestly say on the night that all this occurred, it was—I had been drinking, but my ultimate intention was to do what was right by turning in the weapon and the gun and the ammunition, when I realized that it was in my possession left by a friend. By me being drunk and not being able to communicate like I should have, everything just got to—way out of proportion, and this just the results of it. And I'm not—I just wanted to make that clear.

MS. CALL: Judge, that also reminded me of one other issue. Early on in the case the ATF investigators were concerned about where this weapon had come from. Mr. Johnson gave a statement to the ATF as a complete statement of where he had obtained the firearm, what he knew about the person who gave it to him, and other information that they asked him

about. It doesn't appear that that's come to any level that he would receive any credit for cooperation, but I think that's another factor within the guideline range for the Court to know about.

THE COURT: Would you like to say anything about that, Mr. Talbot, anything to add on that particular factor of cooperation?

MR. TALBOT: Your Honor, he did tell the ATF agents where he had obtained the gun. I think gave the name of the friend he'd obtained it from. However, nothing was able to be developed with that. But that is—Ms. Call's statement is correct.

THE COURT: Anything further, Ms. Call?

MS. CALL: No, Your Honor.

THE COURT: The Court has asked the defendant why judgment should not now be pronounced, and after hearing the defendant's response, the Court has found no cause to the contrary. The parties have made statements in their behalf or have waived the opportunity to do so, and the Court has reviewed the presentence report. Pursuant to Title 18, United States Code, Sections 3551 and 3553, and the Sentencing Reform Act of 1984, as modified by United States versus Booker and Fanfan, it is the judgment of the Court that the defendant, Curtis Darnell Johnson, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 185 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. While on supervised release, the defendant shall comply with the standard conditions adopted by the Court in the Middle District of Florida. In addition, you shall comply with the following

special conditions: You shall participate in a substance abuse program, outpatient and/or inpatient, and follow the probation officer's instructions regarding the implementation of this Court directive. Further, you shall contribute to the costs of these services, not to exceed an amount determined reasonable by the probation office's sliding scale for substance abuse treatment services. During and upon the completion of this program, you are directed to submit to random drug testing. You shall participate in the mental health treatment program, outpatient and/or inpatient, and follow the probation officer's instructions regarding the implementation of this Court directive. Further, you shall contribute to the costs of these services, not to exceed an amount determined reasonable by the probation office's sliding scale for mental health treatment services. The defendant shall submit to a search of his person, residence, place of business, any storage units under his control, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. You shall inform any other residents that the premises may be subject to a search pursuant to this condition. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on supervised release, and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant having been convicted of a qualifying felony, shall cooperate in the collection of DNA as directed by the probation officer.

Based on the financial status of the defendant, the Court waives imposition of a fine and applicable costs of supervision and imprisonment. It is further ordered that the defendant shall pay the United States a special assessment of $100 which shall be due immediately. It is further ordered that you shall forfeit to the United States those assets identified in the indictment. Specifically, you shall forfeit to the United States the ammunition referenced in Count 1 of the indictment. After considering the sentencing guidelines advisory recommendation, the minimum mandatory sentence required by statute, and all other factors identified in Title 18, United States Code, Section 3553(a) 1 (1) through (7), the Court finds that the sentence complies with the purposes of sentencing set forth in Title 18, United 5 States Code, Section 3553(a).

Mr. Johnson, I have sentenced you as I have primarily because of your very, very strong criminal history. You've been convicted of multiple violent felony offenses and multiple serious substance abuse offenses. Your criminal history first began when you were just a young man of 15, and you were adjudicated delinquent concerning the carrying of a concealed firearm. At 16 you were sentenced to a year in prison in relation to a conviction for aggravated battery. You have been in and out of prisons for many, many years. So you're classified as an armed career criminal because of your prior convictions for violent felonies, and that's why the statute requires a minimum mandatory 15-year term of imprisonment. The statute requires a minimum mandatory 15-year term of imprisonment, and a review of your record shows most of the victims of your violent acts have been women.

So I find your history very troublesome, quite frankly. I am hopeful that while you are incarcerated you can get the help that you need so that you can lead a productive life when you are released from prison, but this requires a stiff sentence because of your history.

The defendant is hereby remanded to the custody of the United States Marshal to await designation by the Bureau of Prisons.

Ms. Call, would you like me to recommend that he be housed in a certain facility?

MS. CALL: At Jesup, Your Honor.

THE COURT: I'll recommend that he be housed in Jesup or as close as possible to the area so that his family is able to remain in contact with him.

You are now advised it is your right of appeal from the judgment and sentence within ten days of this date. Failure to appeal within the ten-day period shall be a waiver of your right to appeal. The government may file an appeal of the sentence. You are also advised that you are entitled to assistance of counsel in taking an appeal, and if you are unable to afford a lawyer, one will be provided for you.

The Court having pronounced sentence, does counsel for the defendant or government have any objections to the sentence or to the manner in which the Court pronounced sentence, other than those previously stated for the record? Mr. Talbot?

MR. TALBOT: No objection from the United States.

THE COURT: Ms. Call?

MS. CALL: Judge, we maintain all of the previously stated objections. I would also object to the

special condition regarding the search. Although I know probationers are not guaranteed the same rights to privacy, I think that the Court's condition is overly broad, delegates too much power to the probation authority, and is not reasonably related to either Mr. Johnson or the offense of conviction.

THE COURT: Do you wish to be heard on that, Mr. Talbot?

MR. TALBOT: Your Honor, I think the court's condition is appropriate. There are some prior indications of drug use and of the presence of drugs, as well as illegal weapons, and so I think the condition is standard and I've seen it applied in many, many cases, so I think it's appropriate.

THE COURT: Thank you, Mr. Talbot.

Your objection is noted, Ms. Call, but overruled.

Anything further, Mr. Talbot?

MR. TALBOT: Not from the United States.

THE COURT: Anything further, Ms. Call?

MS. CALL: No, Your Honor.

THE COURT: All right. Thank you. We stand adjourned.

COURT SECURITY OFFICER: All rise. This Court is now in recess.

(Proceedings concluded at 3:51 p.m.)

* * *

IN THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NOS.: 02-CF-4806-AXXX
02-CF9163-AXXX
DIVISION: CR-C

STATE OF FLORIDA

v.

CURTIS JOHNSON

Defendant.

---

* * * *

MS. ESPENSHIP: Your Honor, if we may call Curtis Johnson, two cases on page 3, please.

THE COURT: All right. Can we have Curtis Johnson, please?

MR. MESSORE: Good morning, Your Honor

THE COURT: Good morning.

MR. MESSORE: Your Honor, Mr. Johnson is before the Court on two cases, Case No. 02-4806-CFA and Case No. 02-9163-CFA. We are here for arraignment in Case No. 02-9163-CFA. At this time I acknowledge receipt of a two-count information.

At this time, Your Honor, pursuant to negotiations with the State and after meeting with and discussing this matter with my client, we've reached a negotiated disposition on both of the cases.

Pursuant to that negotiated disposition, Your Honor, my client would withdraw a previously entered plea of

not guilty in Case No. 02-4806-CFA and enter a plea of guilty to the sole count of felony battery, and in the case we're here for arraignment on, Case No. 02-9163-CFA, Mr. Johnson would enter a plea of guilty to Count 2 of the information, which is possession of cocaine, with the understanding that the State would have an announcement as to Count 1 of the information.

Your Honor, Mr. Johnson would be adjudicated guilty on both counts that he's pleading guilty to. He would be sentenced to serve 18 months level 2 community control, and as part of his community control, he would have to undergo drug and alcohol evaluation with any recommended follow-up treatment, undergo random urinalysis, enter and complete the First Step Program with Hubbard House, pay $276 in court costs, and have no contact with a Cavetta White.

Also he would serve—do you have the credit?

THE CLERK: In 2002-9163-CFA, he has 23 days credit, and in 2002-4806-CFA, he has 45 days credit.

MR. MESSORE: So I guess, Your Honor, that would be 45 days Duval County Jail with credit for time served.

My client and I and the State have signed the form, Your Honor.

(The defendant was sworn.)

THE COURT: Okay. And these special conditions of community control will apply in both cases?

MS. ESPENSHIP: Yes, sir.

MR. MESSORE: Yes, sir.

THE COURT: And does Mr. Johnson have a prior felony conviction?

MS. ESPENSHIP: Yes, sir.

THE COURT: Tell me your full name, please.

THE DEFENDANT: Curtis Darnell Johnson.

THE COURT: How old are you, Mr. Johnson?

THE DEFENDANT: 33.

THE COURT: How far did you go in school?

THE DEFENDANT: Ninth grade.

THE COURT: Can you read and understand English?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read and understand everything on this form entitled Plea of Guilty and Negotiated Sentence?

THE DEFENDANT: Yes, sir

THE COURT: Is this your signature on the bottom of the back page?

THE DEFENDANT: Yes, sir.

THE COURT: Is everything on this form true and correct?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty to the charge in Count 1 of the new case and to the single count of the older case because you are guilty of those offenses?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you or coerced you or promised you anything to cause you to enter these pleas?

THE DEFENDANT: No, sir.

THE COURT: You understand that by pleading guilty to these charges you're giving up your right to a trial, the right to remain silent, the right to present witnesses in your own behalf, the right to confront witnesses against you, the right to require the State to prove these charges, and the right against self-incrimination?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to discuss these cases with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to think about these charges, any defenses you may have to them, and the consequences of these pleas?

THE DEFENDANT: Yes, sir.

THE COURT: Are you today under the influence of any drugs or alcohol or medication?

THE DEFENDANT: No, sir.

THE COURT: Mr. Messore, will you stipulate to a factual basis?

MR. MESSORE: Yes, sir.

THE COURT: I'll find that your pleas of guilty to these two charges are freely and voluntarily entered. I will find from the record that there is a factual basis to accept these pleas.

And as to Count 1 in Case No. 2002-9163 and as to the single count in Case No. 2002-4806, I will adjudicate you guilty, sentence you to the time you've already served in each of those cases, to be followed by 18 months of probation to run concurrent each

with the other under the standard conditions of—I'm sorry, 18 months of community control level 2, that should be, under the standard conditions of community control level 2, with a special condition that you submit to a drug and alcohol evaluation and complete any treatment that is recommended as a result of that evaluation.

You'll be required to submit to random drug tests at your expense to show that you're not using any illegal drugs. You'll be required to enroll in and complete the First Step Program at the direction of your probation officer, pay court costs in each case of $276, and pay a $90 public defender charge in each case; that's the application fee and services.

And a special condition of community control in each case will be that you have no contact with Cavetta White. There is a daily electronic monitoring charge which you will also have to pay. If it's a radio frequency, it's $3 and change. If it's the GPS, it's $9 and change. Depends on which system they use. You'll also have to pay that as well, as well as the costs of supervision.

Does the State have an announcement as to Count 1?

MS. ESPENSHIP: Yes. Nol pros Code 30.

THE COURT: You would have 30 days from today's date to appeal that sentence if you think that that is an illegal sentence, but your pleas of guilty waive your right to appeal any other issue.

You'll need to first step over to your left to be fingerprinted and then back to your right to speak to the probation officer.

MR. MESSORE: And I apologize, Your Honor. I may have misheard you, but when you were first

going through the sentence, I believe you had adjudicated him on Count 1.

THE COURT: Okay. That was my mistake. It's Count 2 in Case No. 2002-9163, not Count 1.

MR. MESSORE: Thank you very much, sir

THE COURT: Thank you for correcting me.

(The proceedings were concluded at 10:16 a.m.)

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 3:06-cr-327-J-33HTS
USM NUMBER: 31729-018

UNITED STATES OF AMERICA

v.

CURTIS DARNELL JOHNSON

Defendant's Attorney: Lisa A. Call, Esquire

THE DEFENDANT:

X pleaded guilty to count One of the Indictment.

__pleaded nolo contendere to count(s) which was accepted by the court.

__was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§ 922(g)(1) and 924(e)	Possession of Ammunition by a Prohibited Person	August, 2006	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, and 18 U.S.C §§ 3551 and 3553.

____The defendant has been found not guilty on count(s)

____Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: July 12, 2007

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

DATE: July13, 2007

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of One Hundred and Eighty Five (185) Months as to Count One (1) of the Indictment.

__X__ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at FCI Jesup Georgia.

__X__ The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States Marshal for this district.

__ at a.m./p.m. on _____.

__ as notified by the United States Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__ before 2 p.m. on _____.

__ as notified by the United States Marshal.

__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on____ to _____ at_____, with a certified copy of this judgment.

/s/ _____
United States Marshal

By:_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

___ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

_X_ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

_X_ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

___ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

___The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

___ The defendant shall participate in the Home Detention program for a period of__. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_X_ The defendant shall participate, as directed by the Probation Officer, in a program (outpatient and/or inpatient) for treatment of narcotic addiction or drug or alcohol dependency. This program may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer's Sliding Scale for Substance Abuse Treatment Services.

_X_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

____ The defendant shall provide the probation officer access to any requested financial information.

____ The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself/herself for any major purchases without approval of the probation officer.

____ If deported by the Bureau of Immigration and Customs Enforcement (BICE), the Defendant shall not re-enter the United States unless allowed to do so legally.

____ Defendant shall perform ___ hours of community service.

____ The defendant shall register with the state sexual offender registration agency(s) in any state where he resides, visits, is employed, carries on a vacation, or is a student, as directed by the probation officer.

____ The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including: schools, day-care centers, theme parks, playgrounds, etc.

___The defendant is prohibited from possessing, subscribing to, or viewing any video, magazines, or literature depicting children in the nude and/or in sexually explicit positions.

_X_ The defendant shall submit to a search of his person, residence, place of business or vehicle, conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	$100.00	0	0

____The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

____The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of payee	Total Amount of loss*	Amount Restitution Ordered	Priority Order or percentage of payment
Totals:	$___	$____	

__Restitution amount ordered pursuant to plea agreement $_____.

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996

____The defendant shall pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

____The court determined that the defendant does not have the ability to pay interest and it is ordered that:

____the interest requirement is waived for the ___fine___restitution.

____the interest requirement for the ___fine ___ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. _X_ Lump sum payment of $ 100.00 due immediately, balance due

___ not later than ___, or

___ in accordance ___ C, ___ D, ___ E or ___ F below; or

B. ___ Payment to begin immediately (may be combined with ___ C, ___ D, or ___ F below); or

C. ___ Payment in equal ___ (e.g., weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g., months or years), to commence ___ days (e.g., 30 or 60 days) after the date of this judgment; or

D. ___ Payment in equal ___ (e.g., weekly, monthly, quarterly) installments of $ ___ over a period of ___, (e.g., months or years) to commence ___ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ___ Payment during the term of supervised release will commence within ____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties,

except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

____Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

____The defendant shall pay the cost of prosecution.

____The defendant shall pay the following court cost(s):

____The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 07-13497
D.C. Docket No. 06-00327-CR-J-33-HTS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CURTIS DARNELL JOHNSON,
Defendant-Appellant.

May 30, 2008

Appeal from the United States District Court
for the Middle District of Florida

Before CARNES and MARCUS, *Circuit Judges*, and DuBOSE,* *District Judge*.

CARNES, *Circuit Judge*:

Curtis Darnell Johnson was convicted of possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), because he had three earlier convictions that the district court determined to be for violent felonies. One of them was for battery in Florida, which would have been a misdemeanor had it not been elevated

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* Honorable Kristi DuBose, United States District Judge for the Southern District of Alabama, sitting by designation.

to felony status under state law because Johnson had an earlier battery conviction. See Fla. Stat. § 784.03(2).

In this appeal from his sentence on the § 922(g) conviction Johnson contends that he should not have been sentenced as an armed career criminal, because felony battery under Florida law does not come within the definition of "violent felony" that is contained in the ACCA, 18 U.S.C. § 924(e)(2)(B). His contention depends on the proposition that the crime of battery under Florida law is not necessarily a "violent" one under the ACCA. That Act's definition of a "violent" crime is one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i). If battery under Florida law fits within that description, it is a violent crime for ACCA purposes; if not, then not.

The crime of battery under Florida law, as we have explained before, requires at a minimum the actual and intentional touching or striking of another person against that other person's will. United States v. Llanos-Agostadero, 486 F.3d 1194, 1197 (11th Cir. 2007); see also United States v. Glover, 431 F.3d 744, 749 (11th Cir. 2005). Because of that, we have held that a Florida battery conviction is one for a "crime of violence" within the meaning of U.S.S.G. § 2L1.2(b)(1), Llanos-Agostadero, 486 F.3d at 1196-98, and also within the meaning of U.S.S.G. § 4B1.2, Glover, 431 F.3d at 749. The relevant part of the "violence" definition for purposes of those two guidelines provisions is identical to the definition of the violence element in § 924(e)(2)(B)(i)—"the use, attempted use, or threatened use of physical force against the person of another." Compare

U.S.S.G. § 2L1.2(b)(1) cmt. n.1(B)(iii), with U.S.S.G. § 4B1.2(a)(1), and 18 U.S.C. § 924(e)(2)(B)(i). It follows that our Llanos-Agostadero and Glover decisions about this same definition of violence apply with full force in § 924(e)(2)(B)(i) cases, unless they have been overruled in some relevant respect.

They have, Johnson argues, pointing to the Florida Supreme Court's decision in State v. Hearns, 961 So. 2d 211 (Fla. 2007), which decided that battery was not a "forcible felony" for purposes of that state's own violent career criminal statute. Id. at 219. His thesis is that Hearns interprets state law in a way that is inconsistent with the state law premise of our Llanos-Agostadero and Glover decisions, which must yield to the authoritative interpretation of Florida law by the highest court of that state.

If state law changes or is clarified in a way that is inconsistent with the state law premise of one of our earlier decisions, the prior panel precedent rule does not bind us to follow our earlier decision. United States v. Chubbuck, 252 F.3d 1300, 1305 n. 7 (11th Cir. 2001) ("[T]he prior precedent rule would not apply if intervening on-point case law from . . . the Florida Supreme Court existed."); Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058, 1066 (11th Cir. 1996); Hattaway v. McMillian, 903 F.2d 1440, 1445 n. 5 (11th Cir. 1990). Johnson is right about that principle, but it does not help him for two reasons.

The first reason is that our decision in Llanos-Agostadero did not come out before the Florida Supreme Court's Hearns decision, but after it—nineteen days later. Because Hearns had been issued and was part of Florida law at the time Llanos-Agostadero was decided, it cannot have changed state law after Llanos-Agostadero was issued. Any change

or clarification of law that Hearns effected existed before Llanos-Agostadero was decided. Emphasizing that the opinion in Llanos-Agostadero does not mention Hearns and came only nineteen days later, Johnson suggests that maybe the prior panel overlooked the Hearns decision. Maybe, but we have categorically rejected an overlooked reason or argument exception to the prior precedent rule. Smith v. GTE Corp., 236 F.3d 1292, 1302-03 (11th Cir. 2001) (categorically rejecting an "overlooked reason" exception to the prior precedent rule); see also Tippitt v. Reliance Standard Life Ins. Co., 457 F.3d 1227, 1234 (11th Cir. 2006) (referring to and following "our decisions that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel"); Saxton v. ACF Indus., 239 F.3d 1209, 1215 (11th Cir.) ("[T]hat holding [of the earlier panel] is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first." (quotation marks and citation omitted)), vacated, 244 F.3d 830 (11th Cir. 2001) (en banc); Turner v. Beneficial Corp., 236 F.3d 643, 650 (11th Cir. 2000) ("Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered."), vacated, 242 F.3d 1023 (11th Cir. 2001) (en banc).

The second reason that the Hearns decision cannot free Johnson from the binding effect of our Llanos-Agostadero precedent is that Hearns is not inconsistent with any state law premise in our decision. This Court in Llanos-Agostadero applied the federal law definition of "violence" with the understanding that any actual or intentional touching or striking of

another against that other person's will is simple battery under Florida law. Llanos-Agostadero, 486 F.3d at 1197. We recognized that simple battery may become a felony if a specified aggravating circumstance is present. Id. at 1197-98. Those state law predicates of our decision are not inconsistent with any of the state law holdings in the Hearns case. Hearns, 961 So. 2d at 218-19 (explaining that any intentional touching against another person's will is battery even if insufficient to injure).

What the Florida Supreme Court decided in Hearns is that the crime of battery, even when aggravated to a felony because of the status of the victim, does not invariably involve enough force to fit within the residual clause of the "forcible felony" definition in that state's violent career criminal statute, Fla. Stat. §§ 775.084(1)(d), 776.08 (defining forcible felony to include "any other felony which involves the use or threat of violence against any individual"). Hearns, 961 So.2d at 213-19. The Hearns decision would have been binding on us if we had been interpreting or applying Florida's violent career criminal statute in the Llanos-Agostadero case or here. See Keener v. Convergys Corp., 342 F.3d 1264, 1267 (11th Cir. 2003); Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1450-51 (11th Cir. 1991). We were not, however, interpreting and applying that Florida statute in the Llanos-Agostadero case or in this one. We were and are applying a federal statute. The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one.

For that reason, nothing that the Florida Supreme Court said in Hearns about that state's violent career criminal statute binds us. What we held in Llanos-

Agostadero does bind us. We follow its holding in concluding that the touching or striking element in the Florida crime of battery satisfies the physical force requirement of the definition of violent felony or crime of violence contained in 18 U.S.C. § 924(e)(2)(B)(i) and in the guidelines provisions that include the same definition, U.S.S.G. § 2L1.2(b)(1) cmt. n.1(B)(iii), and § 4B1.2(a)(1). Our conclusion here is consistent with our recent decision in United States v. Young, No. 14780___ F.3d___ (11th Cir. May 19, 2008). That case involved the issue of whether the Florida crime of using fluids to commit battery of a child, Fla. Stat. § 784.085, is a crime of violence within the meaning of U.S.S.G. § 4B1.2(a)(1). After acknowledging the existence of the Hearns decision, we nonetheless held that the crime was one of violence because "[t]he impact of the fluids against the child creates pressure and this minimal impact satisfies the requirement of physical force." Young, No. 07-14780, slip op. at 2275-76.

Johnson raises a few other issues, all of which are ruled out by binding precedent. His contention that the definition of felony for ACCA purposes does not include a misdemeanor that became a felony only because of a state recidivist statute is foreclosed by the Supreme Court's recent decision in United States v. Rodriquez, No. 06-1646, 553 U.S. ___, S. Ct. ___ (May 19, 2008). His contention that the district court lacked the authority to sentence him as an armed career criminal because he did not admit in his guilty plea to the facts necessary to being one is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998). And his contention that his sentence of 185 months for being an armed career criminal in possession of ammunition violates the

Cruel and Unusual Punishment Clause of the Eighth Amendment is foreclosed by United States v. Lyons, 403 F.3d 1248, 1257 (11th Cir. 2005) (upholding against a cruel and unusual punishment attack a sentence of 235 months for an armed career criminal convicted for being a felon in possession of ammunition); see also Ewing v. California, 538 U.S. 11, 30-31, 123 S. Ct. 1179, 1190 (2003) (upholding a sentence of 25 years to life for a recidivist who stole three golf clubs); Rummel v. Estelle, 445 U.S. 263, 265-66, 285, 100 S. Ct. 1133, 1134-35, 1145 (1980) (upholding a life sentence with parole possibility for a recidivist who fraudulently obtained $120.75).

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed July 22, 2008]

No. 07-13497-FF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CURTIS DARNELL JOHNSON,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: CARNES and MARCUS, Circuit Judges, and DuBOSE,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

---

* Honorable Kristi DuBose, United States District Judge for the Southern District of Alabama, sitting by designation

PETITIONER'S BRIEF

129

No. 08-6925

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether the element of use of "physical force against the person of another," as found in the definition of "violent felony" in the Armed Career Criminal Act, requires violence and aggression likely to create a serious potential risk of physical injury, a standard that is not satisfied by the *de minimis* contact required for a non-consensual touching?

II. Is the holding of a state's highest court, that a given offense of that state does not have as an element "the use or threatened use of physical force," binding on federal courts in determining whether that same offense qualifies as a "violent felony" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" under § 924(e)(2)(B)(i) of the Armed Career Criminal Act?

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IN THE

Supreme Court of the United States

No. 08-6925

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 528 F.3d 1318 (11th Cir. 2008), and is reproduced in the Joint Appendix (JA) at 81-87. The district court held a sentencing hearing at which it orally ruled that Petitioner Curtis Darnell Johnson's prior battery conviction under Florida law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). JA 49. The transcript of the sentencing hearing is reproduced at JA 12-27, 38-61.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on May 30, 2008. JA 81-87. The court

denied Mr. Johnson's request for rehearing *en banc* on July 22, 2008. JA 88. Mr. Johnson timely filed a petition for writ of certiorari on October 20, 2008, which this Court granted. 129 S. Ct. 1315 (Feb. 23, 2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(e) of Title 18 of the United States Code provides, in relevant part,

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> * * * *
>
> (B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Florida Statute § 784.03 (2002) provides:

> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.
>
> (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

STATEMENT OF THE CASE

Does the slightest non-consensual touching of another person constitute the "use of physical force" as required for a "violent felony" pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i)? The court below held that it does. That holding is contrary to this Court's precedent, to the ordinary and natural meaning of "physical force"

in the context of the ACCA, to the better-reasoned decisions of numerous other circuits, and to the legislative history. It is also contrary to the decision of the Florida Supreme Court, which is binding on federal courts, that the Florida crime of battery by touching does not contain the element of "use of physical force." Mr. Johnson therefore asks this Court to reverse the decision below, which affirmed an ACCA sentence more than five times the advisory guideline range by holding that his prior battery conviction in Florida was a violent felony.

1. Mr. Johnson pleaded guilty to possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). JA 12-13. At sentencing, the government sought to have Mr. Johnson sentenced under the enhanced penalties of the ACCA. It introduced evidence of three prior convictions to support the enhancement. JA 21-22. Mr. Johnson challenged only the use of his 2002 Florida battery conviction, JA 28-32, on the basis that it was not a violent felony within the meaning of the ACCA. JA 19, 21-22.

2. Simple battery is ordinarily a misdemeanor in Florida, but Mr. Johnson's 2002 simple battery charge was enhanced to a third-degree felony because he had sustained a prior conviction for simple battery in 1989. JA 37; *see* Fla. Stat. § 784.03(2). In Florida, simple battery occurs when a person "[a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). "[A]ny intentional touching, no matter how slight, is sufficient to constitute a simple battery." *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007). Even touching an object that has an "intimate connection" with another person can

constitute battery under Florida's statute. *Nash v. State*, 766 So. 2d 310, 310 (Fla. App. 2000) (victim's closely-held purse); *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001) (victim's vehicle). The Florida Supreme Court has held that the underlying conduct required for simple battery and felony battery "is identical," and that when felony battery is based on the commission of simple battery by touching, it does not have as an element "the use or threat of physical force or violence against any individual."[1] *Hearns*, 961 So. 2d at 214, 218-19.

3. The information filed in Mr. Johnson's 2002 battery case charged that he "did actually and intentionally touch or strike [the victim] against the will of said person." JA 37. When he pleaded guilty, he merely stipulated that there was "a factual basis" for the charge. JA 65. During the change-of-plea hearing, at which the court also sentenced Mr. Johnson, there was no mention of how Mr. Johnson committed the battery. JA 62-67. The written judgment reflected a conviction for "Felony Battery (one prior)." JA 28.

4. The state court records introduced at Mr. Johnson's federal sentencing hearing did not prove that Mr. Johnson had been convicted of anything other than battery by unwanted touching in 2002. JA 28-37, 40, 62-67. Mr. Johnson argued that a mere unwanted touching did not constitute "physical force" as Congress intended that term to be used in the ACCA, and that such touching did not involve a serious potential risk of physical injury. JA 45-47; Sealed JA 134-35. Mr. Johnson also argued that any

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[1] The quoted language comes from Florida Statute § 776.08, which defines a "forcible felony." The language is nearly identical to that found in § 924(e)(2)(B)(i).

holding purporting to equate touching with physical force would be directly contrary to the Florida statute, which prohibits touching *or* striking. JA 46-47. "If all touching is itself violent, there wouldn't be a need to have an 'or' [in] the underlying statute. But in fact, there are alternative ways. The definition of striking can be one that necessarily implies some sort of force. Touching does not." JA 47.

The government argued that, under Eleventh Circuit precedent, the Florida crime of battery always constitutes a crime of violence. JA 40-45. In support of this argument, the government cited *United States v. Glover*, 431 F.3d 744, 749 (11th Cir. 2005), which held that battery on a law enforcement officer is a "crime of violence" under the career offender guideline, United States Sentencing Guideline Manual ("U.S.S.G.") § 4B1.1. As with the violent felony definition in § 924(e)(2)(B)(i), a prior conviction is a "crime of violence" under U.S.S.G. § 4B1.1 if it is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1).

The district court overruled Mr. Johnson's objections. It accepted the government's arguments and the probation officer's position that "[o]ne cannot physically touch or be physically touched without the use of force" and that "touching someone against their will does in fact present a serious potential risk of physical injury." JA 47-49. The court sentenced Mr. Johnson to 185 months' imprisonment, five months more than the fifteen-year mandatory minimum required by the ACCA. JA 57. But for the ACCA enhancement, Mr. Johnson faced a statutory maximum of ten years (18 U.S.C. §§ 922(g), 924(a)(2)), and his advisory guideline imprisonment

range would have been twenty-seven to thirty-three months.[2]

5. Mr. Johnson appealed, arguing that the Florida Supreme Court's recent decision in *Hearns* was binding on federal courts, thereby abrogating Eleventh Circuit precedent holding that simple battery under Florida law necessarily involves the use of physical force. JA 83. Mr. Johnson also argued that the Florida crime of battery by mere non-consensual touching did not "involve[] conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B)(ii). The Eleventh Circuit agreed with Mr. Johnson on the latter point, as its decision quoted § 924(e)(2)(B)(i), then stated "[i]f battery under Florida law fits within that description, it is a violent crime for ACCA purposes; if not, then not." JA 82. Nevertheless, the court affirmed the district court's decision.

In upholding Mr. Johnson's sentence, the Eleventh Circuit ruled that its precedent finding the Florida offense of battery by touching or striking to be a crime of violence was not undermined by the Florida Supreme Court's ruling in *Hearns*. JA 81-87. "The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one. For that reason, nothing that the Florida Supreme Court said in *Hearns* about that state's violent career criminal statute binds us." JA 85.

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[2] The guideline calculation in the presentence report included a six-level increase based on the 2002 battery conviction being a "crime of violence." Sealed JA 96-97; U.S.S.G. § 2K2.1(a)(4)(A). Absent that increase, Mr. Johnson's advisory guideline range would be twenty-seven to thirty-three months.

SUMMARY OF ARGUMENT

I. A battery committed by the slightest non-consensual touching is not a violent felony. Under § 924(e)(2)(B)(i) of the ACCA, a violent felony is one that has *as an element* the use, attempted use, or threatened use of *physical force* against the person of another. The term "physical force" is being interpreted here in the context of a severe sentencing enhancement statute, not in the context of an equation of the laws of physics. When it is being used to define a "violent felony," the ordinary and natural meaning of the term "physical force" logically requires that the criminal act be violent, aggressive, and likely to create a serious potential risk of physical injury. Crimes such as murder and rape fit within that definition. A battery that can be committed merely by an unwanted tap on the shoulder does not.

Such a common-sense, contextual interpretation of "physical force" finds strong support in this Court's decisions construing the ACCA and the nearly identical definition of "a crime of violence" in 18 U.S.C. § 16(a). It is further bolstered by dictionary definitions—both legal and non-legal—that routinely equate force and physical force with violence and injury. The majority of circuit courts correctly reason that the "use of physical force" in the context of a violent felony or a crime of violence means more than force in the Newtonian mechanics sense. The legislative history of the ACCA further shows that Congress' intent was to target only the very worst offenders, that small group comprising the country's toughest criminals and superfelons, not to target persons who commit garden-variety local crimes such as battery by touching. Finally, if, after examining the plain language and context of the statute, the

decisions of this Court and of the circuit courts, and the legislative history, any doubt remains as to the definition of the term "physical force," the rule of lenity compels that doubt be resolved in Mr. Johnson's favor.

II. The Florida Supreme Court is the final authority on the interpretation of Florida statutes. That court has squarely held that the offense of battery does not categorically contain the "use or threat of physical force" as an element because the crime can be committed by touching. The Florida Supreme Court's determination that a Florida conviction for battery by touching does not contain as an element "use of physical force" must be respected and followed by federal courts when deciding whether a Florida battery conviction constitutes a violent felony under the ACCA. At a bare minimum, that determination provides persuasive guidance in determining whether battery by touching is a violent felony under the ACCA.

ARGUMENT

BATTERY BY TOUCHING IS NOT A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT BECAUSE IT DOES NOT HAVE AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER.

An unwanted tap on the shoulder is a violent offense under the Eleventh Circuit's reading of the Armed Career Criminal Act, which defines a "violent felony" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Although a tap on the shoulder may

be "force" under the laws of Newtonian mechanics, this case turns not on the scientific meaning of force, but on the legal meaning of "physical force" as used to define a "violent felony."

The context in which physical force must be examined is the Florida crime of battery by the slightest unwanted touching. *See* Fla. Stat. § 784.03; *State v. Hearns*, 961 So. 2d 211 (Fla. 2007). The elements of the battery offense, as charged herein, are that Mr. Johnson "did actually and intentionally touch or strike [the victim] against the will of said person." JA 37. Because Mr. Johnson was charged in the disjunctive, and there was no evidence in the record as to whether the crime was committed by touching or striking, the issue here is whether battery by touching is a violent felony.

Mr. Johnson argued below that a battery by mere unwanted touching does not have as an element the use of physical force as required by the ACCA. The courts below disagreed, relying on Eleventh Circuit precedent that any touching or striking satisfies the element of physical force. JA 47-49, 85-86. The majority of circuits, however, support Mr. Johnson's position. *See* Part I.B., *infra*. In fact, three of those circuits have also ruled, contrary to the decision below, that the Florida offense of battery does not categorically contain the element of physical force precisely because it can be premised on touching. *United States v. Barraza-Ramos*, 550 F.3d 1246, 1250-51 (10th Cir. 2008) (holding that the Florida crime of felony aggravated battery, "premised on a violation of § 784.03's prohibition on intentionally touching a person against her will *or* striking a person against her will, does not have as an element the use, attempted use, or threatened use of physical force against another person"); *United States v.*

Luque-Barahona, 272 F. App'x 521, 523 (7th Cir. 2008) (same; government conceded felony battery in Florida does not always include the element of use of physical force against another); *United States v. Gonzalez-Chavez*, 432 F.3d 334, 338 n.6 (5th Cir. 2005) (same; holding Florida offense of battery on a pregnant woman can be committed without the use of physical force, *e.g.*, by spitting).

The majority of the circuits follow the better-reasoned approach to defining the term "physical force" and resolving the conflict over whether the Florida battery statute "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). Physical force must be defined in terms of its plain meaning, *i.e.*, its ordinary and natural meaning, and in the context of the words surrounding it. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This includes "the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.). Hence, physical force is best defined in terms of violence and aggression that is likely to create a serious potential risk of physical injury. The legislative intent behind the ACCA favors such a definition.

The Florida Supreme Court applied this reasoning in holding that Florida's crime of battery does not categorically include the element of the use or threat of physical force because it can be committed by the slightest unwanted touching. Federal courts are bound by that decision in determining the applicability of § 924(e)(2)(B)(i) when the purported predicate offense is the Florida crime of battery.

I. THE ELEMENT OF "PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER," AS FOUND IN THE DEFINITION OF "VIOLENT FELONY" IN THE ACCA, REQUIRES VIOLENCE AND AGGRESSION LIKELY TO CREATE A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY, A STANDARD THAT IS NOT SATISFIED BY THE *DE MINIMIS* CONTACT REQUIRED FOR A NON-CONSENSUAL TOUCHING.

Although this case represents the first in which this Court will interpret the first clause of the violent felony definition of the ACCA—§ 924(e)(2)(B)(i) ("the physical force clause")—insight into that clause can be gleaned from this Court's prior decisions, from the ordinary and natural meaning of the terms contained in the physical force clause in light of their statutory context, and from the better-reasoned decisions of the majority of the circuits. Those insights lead to the conclusion that the use of physical force against the person of another, in the context of a violent felony, requires violence and aggression likely to create a serious potential risk of physical injury. The legislative history comports with this meaning.

A. The ordinary and natural meaning of "physical force" in the context of the ACCA requires violence and aggression likely to create a serious potential risk of physical injury.

1. This Court analyzed the element of the use of physical force in *Leocal v. Ashcroft* in the context of 18 U.S.C. § 16(a), which defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force

against the person or property of another."[3] The Court began its analysis with the "language of the statute," recognizing that the statutory language must be considered "in its context and in light of the terms surrounding it." 543 U.S. at 8, 9 (citing *Bailey v. United States*, 516 U.S. 137, 143, 144 (1995), and *Smith v. United States*, 508 U.S. 223, 229 (1993)). In so doing, "we must give words their 'ordinary or natural' meaning." *Leocal*, 543 U.S. at 9 (quoting *Smith*, 508 U.S. at 228). The *Leocal* Court stated that the term "use"—as in "use . . . of physical force *against the person or property of another*"—"requires active employment." *Id.* (citing *Bailey*, 516 U.S. at 145). "Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.* at 11.

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.

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[3] The question in *Leocal* was whether the Florida crime of driving under the influence of alcohol ("DUI") and causing serious bodily injury was a "crime of violence." *Leocal*, 543 U.S. at 3-4. Ultimately, this Court held that DUI and causing serious bodily injury was not a crime of violence under § 16(a) or (b), the latter of which defines crime of violence as any other felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 10-11.

Id. at 11 (emphasis added).[4] *Leocal* thus illustrates that offenses that have as an element the use of physical force against another person are purposeful, violent, active crimes.

This Court shed further light on this matter in *Begay v. United States*, 128 S. Ct. 1581 (2008), when discussing the types of crimes the ACCA was created to target:

> In our view, DUI differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve *purposeful, "violent," and "aggressive" conduct.* That conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a *purposeful, violent, and aggressive* manner are "potentially more dangerous when firearms are involved." And *such crimes are "characteristic of the armed career criminal, the eponym of the statute."*

Id. at 1586 (internal citations omitted; emphasis added).

The words "violent" and "aggressive" appear together five times in the majority opinion in *Begay*. *Id.* at 1586, 1588. Additionally, Justice Scalia observed that "[c]rimes that include as an element the use . . . of physical force against the person of another are all embraced . . . by the requirement of

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[4] *See also Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase gathers meaning from the words around it.") (internal quotation marks omitted).

purposeful, violent, and aggressive conduct[.]" *Id.* at 1591 (Scalia, J., concurring) (internal quotation marks omitted). Justice Alito added that the physical force clause "includes offenses that have as an element the use or threatened use of violence." *Id.* at 1595 (Alito, J., dissenting). Further, "purposeful, 'violent,' and 'aggressive' conduct" was the key to recognizing that the offense of failure to report was not a violent felony in *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009).

2. Violence and aggression are consistent with the ordinary and natural meaning of the use of physical force against the person of another. That meaning, however, simply cannot be said to include the minimal pressure involved in a slight touching. This is especially so given that the phrase in which the term "physical force" is used—"the use, attempted use, or threatened use of physical force against the person of another"—is an elemental part of the definition of a "violent felony." To hold otherwise would place an extraordinary and unnatural meaning on the term "physical force," thereby leading to unwarranted results. *Cf. Hearns*, 961 So. 2d at 218-19.

Violence, which ordinarily involves the serious potential risk of physical injury, is obviously consistent with a "violent felony," the term that "physical force" is being used to define. *See Leocal*, 543 U.S. at 11; *Doe*, 960 F.2d at 225. When the ordinary and natural meaning of the term "physical force" is considered in the context in which that term is used, it is evident that violent and aggressive force is also "likely to create 'a serious potential risk of physical injury[.]'" *Begay*, 128 S. Ct. at 1585. As this Court recognized in *Begay*:

> [I]f Congress meant clause (ii) to include *all* risky

> crimes, why would it have included clause (i)? A crime which has as an element the "use, attempted use, or threatened use of physical force" against the person (as clause (i) specifies) is likely to create "a serious potential risk of physical injury" and would seem to fall within the scope of clause (ii).

Id. The "physical force" required to constitute a "violent felony" is thus naturally associated with violent, aggressive conduct likely to create a serious potential risk of physical injury, not with the slightest non-consensual touching.

3. That ordinary and natural meaning of "physical force" is confirmed by dictionary definitions. The edition of Black's Law Dictionary in effect when the ACCA was enacted defined "physical force" as "[f]orce applied to the body; actual violence." *Black's Law Dictionary* 1032 (5th ed. 1979) ("*Black's* 5th"). The current edition defines physical or actual force as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim" and force as "[p]ower, violence, or pressure directed against a person or thing." *Black's Law Dictionary* 673 (8th ed. 2004) ("*Black's* 8th"). The word "violence" is also commonly found in other dictionary definitions of force. *See, e.g.*, 6 *Oxford English Dictionary* 34 (2d ed. 1989) ("*OED*") ("*spec.* in *Law*: Unlawful violence offered to persons or things."); *Random House Unabridged Dictionary* 748 (2d ed.1993) ("*Random House*") ("*Law.* Unlawful violence threatened or committed against persons or property."); *Webster's Third New International Dictionary* 887 (1986) ("*Webster's International*") ("power, violence, compulsion, or constraint exerted upon or against a person or thing"; synonymous with "violence, compulsion, coercion, duress, constraint, restraint:

force is a general term for exercise of strength or power, esp. physical, to overcome resistance").

Just as the words "violent" and "violence" are commonly used to define "force," the word "force"—with modifiers such as strong, extreme, intense, destructive, injurious—is used to define the words "violent" and "violence." Thus, for example, "violent" is commonly defined as "[c]haracterized by the doing of harm or injury; accompanied by the exercise of violence"; "[c]haracterized by the exertion of great physical force or strength" (19 *OED* 656); "acting with or characterized by uncontrolled, strong, rough force"; "caused by injurious or destructive force"; "intense force, effect, etc.; severe; extreme" (*Random House* 2124); "characterized by extreme force" (*Webster's International* 2554). The edition of Black's in effect at the time the ACCA was enacted defined the term "violent offenses" as "[c]rimes characterized by extreme physical force, such as murder, forcible rape, and assault and battery by means of a dangerous weapon." *Black's* 5th 1408.

The same edition of Black's defined "violence" as "[u]njust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage, or fury. . . . Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against the laws, and against public liberty. . . . The exertion of any physical force so as to injure, damage, or abuse." *Id.* (internal citations omitted). Other common definitions of violence include "[t]he exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or usage tending to cause bodily injury or forcibly interfering with personal freedom" (19 *OED* 654); "swift and intense force"; "rough or injurious physical force,

action, or treatment" (*Random House* 2124); "exertion of any physical force so as to injure or abuse" (*Webster's International* 2554).

The words "force," "violent," and "violence" thus have similar definitions. The word "touch," on the other hand, has quite a different definition, that being "[t]o put the hand or finger, or some other part of the body, upon, or into contact with (something) so as to feel it"; "to exercise the sense of feeling upon" (18 *OED* 295). It would defy the ordinary and natural meaning of physical force, in the context of a violent felony, to equate it with such nonviolent acts.

In sum, this Court's decisions and the ordinary and natural meaning of physical force in the context of a violent felony demonstrate that the force must be aggressive, violent, and likely to create a serious potential risk of physical injury. The majority of the circuits are in agreement with this definition of physical force.

B. The better-reasoned circuit opinions show that physical force should be read to require violent, aggressive conduct likely to create a serious potential risk of physical injury.

1. Judge Easterbrook has provided perhaps the most cogent and persuasive explanation of why the "use of physical force" must be read to mean more than the minimal contact required for the slightest touch. *See Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). Addressing the difference between nonviolent touching and violent, injurious force in the context of the physical force clause of 18 U.S.C. § 16, Judge Easterbrook wrote:

> Section 16(a) refers to the "use of physical force". Every battery entails a touch, and it is

impossible to touch someone without applying *some* force, if only a smidgeon. Does it follow that every battery comes within § 16(a)? No, it does not. Every battery involves "force" in the sense of physics or engineering, where "force" means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. That's a tiny amount; a paper airplane conveys more. (A newton, the amount of force needed to accelerate a kilogram by one meter per second per second, is 100,000 dynes, and a good punch packs a passel of newtons.) Perhaps one *could* read the word "force" in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones. How is it possible to commit *any* offense without applying a dyne of force?

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To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word "force" as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so. . . . Otherwise "physical force against" and "physical contact with" would end up meaning the same thing, even though these senses are distinct in law. This is not a quantitative line ("how many newtons makes a touching violent?") but a qualitative one. An offensive touching is on the "contact" side of this line, a punch on the "force" side[.]

Flores, 350 F.3d at 672 (internal citations omitted).

The Ninth Circuit employed similar reasoning in concluding that a conviction under Wyoming's battery statute did not constitute a crime of domestic violence under 18 U.S.C. § 922(g)(9). *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). The Wyoming statute defines battery as "unlawfully touch[ing] another in a rude, insolent or angry manner or intentionally, knowingly or recklessly caus[ing] bodily injury to another." *Id.* at 1067. The court explained:

> Any touching constitutes "physical force" in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced. Our purpose in this statutory construction exercise, though, is to assign criminal responsibility, not to do physics. As a matter of law, we hold that the physical force to which the federal statute refers is not *de minimis*.

Id. at 1067-68. Therefore, a rude touching is not the use or attempted use of physical force. *Id.* at 1068. "The phrase 'physical force' in the federal definition . . . means the violent use of force against the body of another individual." *Id.*

The Tenth Circuit followed *Flores* and *Belless* when it construed Wyoming's battery statute in the context of § 922(g)(9). *United States v. Hays*, 526 F.3d 674, 677-79 (10th Cir. 2008). The court added:

> Indeed, one can think of any number of "touchings" that might be considered "rude" or "insolent" in a domestic setting but would not rise to the level of physical force discussed above. For example, in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch might very well be considered "rude" or "insolent" in the context of a vehement

> verbal argument, but it does not entail "use of physical force" in anything other than an exceedingly technical and scientific way. Similarly, "indirect" contact such as throwing "a snowball, spitball, or paper airplane," or water at one's spouse or domestic partner, without causing harm or injury, could be considered rude or insolent touching under the Wyoming statute. *See Flores*, 350 F.3d at 669. We doubt this kind of contact was the type of crime of "domestic violence" that Congress had in mind when it passed § 922(g)(9).

Id. at 679 (footnote omitted). The Tenth Circuit noted that it "may be correct from a scientific perspective" to conclude that any touching requires some level of physical force. *Id.* at 681. Nonetheless, the court held that "'physical force' in a 'crime of violence,' must, from a legal perspective, entail more than mere contact. Otherwise, *de minimis* touchings could give federal statutes, like § 922(g)(9), an overly broad scope and impact." *Id.*

In other cases, the Fifth and Tenth Circuits have recognized that "'[f]orce,' as used in the definition of a 'crime of violence,' is 'synonymous with destructive or violent force.'" *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003) (quoting *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001)). The Fourth Circuit has noted that battery by kissing without consent, touching, tapping, jostling, or throwing water upon another does not require the use, attempted use, or threatened use of physical force. *United States v. Simms*, 441 F.3d 313, 315 (4th Cir. 2006).

Finally, the D.C. Circuit in *United States v. Mathis*, 963 F.2d 399 (D.C. Cir. 1992), recognized that robbery committed "by sudden or stealthy seizure or

snatching" did not constitute a "violent felony" under § 924(e)(2)(B)(i). The court first noted that the ACCA created one category of crimes against the person and a second category of crimes against property. *Id.* at 405. The court then explained that "[a] brief examination of the legislative history of this definition of violent felonies against the person reveals that Congress intended that the penalty enhancement provision apply primarily to career criminals who have committed violent crimes." *Id.* The court concluded that "when Congress amended the enhancement provision to cover all violent felonies that have 'as an element the use, attempted use, or threatened use of physical force against the person of another,' 18 U.S.C. § 924(e)(2)(B)(i) (1988), it did not intend to include felonies in which the use of force was *de minimis*[.]" *Id.* at 407.

2. The circuits on the other side of the split do not consider the ordinary and natural meaning of the term "physical force" in the context of defining a violent felony, do not address this Court's precedent on violent felonies/crimes of violence, and do not discuss the extensive legislative history demonstrating the intended scope of the ACCA. The only such courts to have applied any analysis to the term "physical force"—*United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), and *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)[5]—did so in the context

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[5] In Mr. Johnson's case, the Eleventh Circuit considered itself bound by its earlier decision in *United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007). JA 85-86. *Llanos-Agostadero* followed the decisions in *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), and *Griffith* without engaging in any independent analysis. 486 F.3d at 1197-98. In *Glover*, the defendant did not argue that Florida's felony battery on a law enforcement officer was not a crime of violence. Instead, he

of § 922(g)(9)'s definition of a "crime of domestic violence," *i.e.*, a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon[.]" 18 U.S.C. § 921(a)(33)(A). Each court's analysis relied on incomplete definitions of physical force taken from Black's. The partial definition used by the courts—"[f]orce consisting in a physical act," *Nason*, 269 F.3d at 16; "'[p]ower, violence, pressure directed against a person' 'consisting in a physical act,'" *Griffith*, 455 F.3d at 1342—omitted the qualification that "physical force" is "esp[ecially] a violent act directed against a robbery victim." *Black's Law Dictionary* 656 (7th ed.1999) ("*Black's* 7th"); *Black's* 8th 673. *Cf. Hays*, 526 F.3d at 677 (quoting the entire definition of "physical force" as well as the definition of "force" and finding, "[c]onsistent with these definitions" and the decision in *Leocal*, "that 'physical force' means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute 'physical force'"). Moreover, neither court acknowledged the definition of physical force that was current when § 922(g)(9) was enacted: "Force applied to the body; actual violence." *Black's Law Dictionary* 1147 (6th ed. 1990).[6]

Furthermore, although both courts noted that Black's defined "force" as "[p]ower, violence, or

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argued that a jury, rather than the district court, should have determined that the offense was a crime of violence. 431 F.3d at 747, 749. The Eleventh Circuit held as a matter of law, without any explanation or analysis, that the battery offense constituted a crime of violence under U.S.S.G. § 4B1.2. *Id.* at 749. The only Eleventh Circuit opinion with analysis for this case, then, is *Griffith*.

[6] The same definition existed when the ACCA was enacted. *Black's* 5th 1032.

pressure directed against a person or a thing,"[7] they chose to exclude "violence" when discussing the meaning of physical force. *Griffith*, 455 F.3d at 1343-44 ("Reaching the *Belless* result in this case would alter the scope of § 922(g)(9) by effectively inserting the word 'violent' into the operative definition contained in § 921(a)(33)(A)(ii)"); *id.* at 1345 ("If Congress had meant to say 'violent physical force' it easily could have done so."); *id.* at 1342 (holding that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force."); *Nason*, 269 F.3d at 20 (holding that "offensive physical contacts . . . invariably emanate from the application of some quantum of physical force, that is, physical pressure exerted against a victim. Therefore, offensive physical contacts with another person's body categorically involve the use of physical force[.]") (citation omitted).

Both courts thus relied on an incomplete definition of physical force to read the idea of violence out of "crime of domestic violence"—the term physical force was defining. *See Leocal*, 543 U.S. at 11 ("In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence."); *Doe*, 960 F.2d at 225 ("we must read the definition in light of the term to be defined, 'violent felony'"); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016, 1018 (9th Cir. 2006) (requiring that physical force be violent and active in context of § 16; stating that the "assumption—that a 'crime of violence' need not actually be 'violent' in nature—is clearly irreconcilable with *Leocal*"). Further, even

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[7] *See Nason*, 269 F.3d at 16 (citing *Black's* 7th 656); *Griffith*, 455 F.3d at 1342 (citing *Black's* 8th 673).

though the word "violent" does not appear in the residual clause of the ACCA, this Court in *Begay* had no difficulty in finding that DUI was not a violent felony because it was not "associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior[.]" 128 S. Ct. at 1588.[8]

In an attempt to buttress their conclusions, both *Griffith* and *Nason* pointed to the "close neighbor" of the statutory provision they were interpreting. *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16-17. Section 922(g)(8)(C)(ii) creates a firearm disability for anyone subject to a court order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury.*" 18 U.S.C. § 922(g)(8)(C)(ii) (emphasis added). Both courts asserted that the emphasized language in § 922(g)(8)(C)(ii) indicated that if Congress had intended the term "physical force" as used in § 922(g)(9) to include only force that is violent or likely to cause physical injury, it knew how to say so. *Griffith*, 455 F.3d at 1342-43; *Nason*, 269 F.3d at 16-17. In making this textual argument, the courts relied, *id.*, on the so-called "*Russello* presumption," whereby when "Congress includes particular language in one section of a statute but omits it in another section of the *same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

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[8] Although the Eleventh Circuit decided *Griffith* in 2006, the court never discussed *Leocal*. Both *Griffith* and *Nason* were decided prior to *Begay*; hence, neither circuit had the benefit of this Court's further explication of the meaning of a violent felony.

exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added).

The *Russello* presumption does not assist in construing § 922(g)(9), however, because, unnoted by either the *Griffith* or the *Nason* court, these two sections were not part of the same Act. Section 922(g)(8)(C)(ii) was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994; § 922(g)(9) was enacted as part of the Omnibus Consolidated Appropriations Act of 1997. *See* Pub. L. No. 103-322, § 110401, 108 Stat. 1796, 2015 (1994); Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-372 (1996).

Further, neither *Griffith* nor *Nason* acknowledged that § 922(g)(9) uses the term "physical force" to refer to the statutory elements of potential predicate crimes, while § 922(g)(8)(C)(ii) uses the term to refer to actual conduct prohibited by a restraining order. "A party seeking a restraining order must make a persuasive showing of irreparable harm[.]" *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). Congress, then, quite logically could have concluded that for the new firearms disability it was creating in § 922(g)(8)(C)(ii) to pass legal muster, it was necessary for any restraining order causing such a disability to explicitly prohibit conduct that "would reasonably be expected to cause bodily injury."

In short, the reasons advanced by the First and Eleventh Circuits for finding that physical force equates to the slightest pressure or touching do not withstand reasoned scrutiny. On the other hand, the analysis of the majority of the circuits—that violent felonies/crimes of violence must have as an element the use of violent, destructive, aggressive, and/or injurious force—is consistent with the ordinary and

natural meaning of physical force in the statutory context. This definition of physical force is also consistent with the legislative history.[9]

C. The legislative intent behind the Career Criminals Amendment Act of 1986 was to target the very worst offenders, a category in which mere touchers were not included.

In the original 1984 version of the ACCA, the predicate offenses for the enhancement were "robbery or burglary, or both." 18 U.S.C. App. § 1202 (1982 ed. Supp. III). In 1986, Congress amended the ACCA to expand the predicate offenses to include serious drug offenses and violent felonies. *See* Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 to -40 (1986) (entitled "Career Criminals Amendment Act of 1986"). The House and Senate Subcommittees heard lengthy testimony regarding this amendment.[10] That testimony, together with the action Congress took based on it, demonstrates that offenses with *de minimis* force and no intent to injure, such as battery

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[9] Neither *Nason* nor *Griffith* considered the ACCA or its legislative history.

[10] *See* Hearing Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 99th Congress, 2nd Session, on S. 2312 (A Bill to Amend Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Relating to Armed Career Criminals, to include a Serious Drug Offense and any Crime of Violence as an Offense Subject to Enhanced Penalties), May 14, 1986, Serial No. J-99-107 ("May 14, 1986 Senate hearing"); Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, 2nd Session, on H.R. 4639 and H.R. 4768 (Armed Career Criminal Legislation), May 21, 1986, Serial No. 96 ("May 21, 1986 House hearing").

by the slightest unwanted touching, are not the type of offenses Congress intended to serve as ACCA predicates.

First, Congress clearly intended the ACCA to target the "very worst offenders";[11] "superfelons";[12] "this country's most hardened felons" and "toughest criminals"[13]—the ones who commit "serious violent crimes"[14] such as "rape and murder."[15] As David Dart Queen, Deputy Assistant Secretary for Enforcement, U.S. Department of the Treasury, testified before the Senate Subcommittee:

> S. 2312 is an important piece of legislation which applies a logical, commonsense definition of violence. We cannot limit our efforts against violence to just the burglar and the robber. The same message must go out to the rapist, the gangland enforcer, or to any professional violent offender.

May 14, 1986, Senate hearing at 20. Given that the Florida crime of felony battery can be committed by mere unwanted touching, with no injury, intent to injure, or likelihood of injury, one would be hard-pressed to characterize an offender convicted of such

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[11] Representative Ron Wyden, May 21, 1986 House hearing at 8.

[12] James West, U.S. Attorney, Middle District of Pennsylvania, Senator Arlen Specter, May 14, 1986 Senate hearing at 18, 19.

[13] Senator Arlen Specter, May 21, 1986 House hearing at 43, 44.

[14] Representative Bill McCollum, May 21, 1986 House hearing at 7.

[15] Representative Wyden, May 14, 1986 Senate hearing at 5; May 21, 1986 House hearing at 8.

a crime as one of society's very worst offenders, one of this country's most hardened felons and toughest criminals, a superfelon, or a professional violent offender.

Second, "prioritiz[ing] offenses"[16]—a key to tailoring the 1986 amendment—further militates against categorizing *de minimis*, noninjurious force offenses as predicates for enhanced sentencing under the ACCA. As observed by Representative William J. Hughes, Chairman of Subcommittee on Crime, "[w]e could make a case . . . to include all crimes, but obviously we do not have the resources[.]" May 21, 1986 House hearing at 26. Representative Ron Wyden stated that the amendment should be drafted so that "garden variety local crimes and property matters" would not be included. *Id.* at 12. On the other hand, he explained, "[i]t doesn't make much sense to say that a referral under that act is possible for a three time bank robber but not a habitual offender with prior convictions for rape or murder." *Id.* at 8, 10. Rape and murder were the two forcible crimes most consistently referred to throughout the hearings. *See, e.g.*, May 21, 1986 House hearing at 8, 10, 46, 51; May 14, 1986 Senate hearing at 5, 7-10, 12, 20, 27, 48, 50, 56, 57.

Crimes requiring no more than *de minimis*, noninjurious force, such as Florida's battery-by-touching offense, are the type of "garden variety local crimes" that Congress did not intend to serve as predicates for the ACCA. *See* May 21, 1986 House hearing at 12. Such offenses are simply too far removed from the violent, injurious, forcible crimes Congress intended to be included as ACCA

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[16] Representative William J. Hughes, May 21, 1986 House hearing at 11.

predicates, *e.g.*, murder and rape. *Id.* at 8, 10; *see also* Senator Arlen Specter, May 21, 1986 House hearing at 46 ("Obviously, the statute can be greatly more effective if it is amended—as the Department of Justice urges—to apply to career criminals whose prior offenses may be murder, rape, or heroin smuggling.").

Third, it is clear that simple battery was not meant to be covered by the ACCA amendment. Deputy Assistant Attorney General James Knapp, who testified before both the House and Senate Subcommittees on behalf of the United States Department of Justice, made this point in his testimony, which was instrumental in fashioning the ACCA into the form in which it now stands.[17] Mr. Knapp specifically endorsed the language contained in H.R. 4768 that eventually became the physical force clause. He stated that "[t]he bill would not cover misdemeanors against a person like simple assault or battery—that aspect we endorse[.]" May 21, 1986 House hearing at 15; *see also id.* at 21.

The Florida felony battery offense of which Mr. Johnson was convicted requires the same element as simple misdemeanor battery—nothing more than the slightest non-consensual touching. Fla. Stat. § 784.03(1)(a); JA 28-37. His offense was enhanced because of a prior misdemeanor battery conviction.

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[17] The bills that were before both Houses at the time Mr. Knapp testified were similar in that they did not have the examples that now are included in § 924(e)(2)(B)(ii), that is, burglary, arson, extortion, and use of explosives. *See, e.g.*, May 21, 1986 House hearing at 15, 23. Mr. Knapp suggested those examples, as well as changes to the language of the serious drug offense provision that were adopted, and clarification of the definition of "felony" to ensure that the federal definition be used. *See id.* at 15, 27; May 14, 1986 Senate hearing at 10.

Fla. Stat. § 784.03(2); JA 28, 37. Surely, persons whose crimes require as an element nothing more than a slight touch of another person against that person's will are not in the same category as murderers, rapists, gangland enforcers, or professional violent offenders. Congress never intimated otherwise. Indeed, interpreting the physical force clause to encompass nominal contact would "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11.

D. If any doubt remains, that doubt must be resolved in favor of defining physical force as violent, aggressive, and likely to create a serious potential risk of physical injury.

The ACCA has generated numerous circuit splits and five decisions from this Court in the last four years.[18] Consistent with these decisions and common sense, the term "physical force" should be read to

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[18] *See Chambers v. United States*, 129 S. Ct. 687 (2009) (holding that crime of failing to report to prison does not constitute a "violent felony" within meaning of residual clause); *United States v. Rodriquez*, 128 S. Ct. 1783 (2008) (interpreting meaning of terms "maximum term of imprisonment," "law," and "offense" in context of definition of "serious drug offense"); *Begay v. United States*, 128 S. Ct. 1581 (2008) (holding that crime of driving under influence is not a violent felony within meaning of residual clause); *James v. United States*, 550 U.S. 192 (2007) (holding attempted burglary falls within residual clause of § 924(e)(1)(B)(ii)); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

require violent, aggressive acts likely to create a serious potential risk of physical injury. *Cf. First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989) (observing that "the most fundamental guide to statutory construction [is] common sense").

In defining physical force to include the slightest touching, the decision below sets out the minority view of what constitutes a violent felony for purposes of the ACCA. To the extent that this minority view allows for any doubt as to the plain meaning of physical force, the rules of strict construction and of lenity require the doubt be resolved in favor of Mr. Johnson by finding that the use of physical force against the person of another must be aggressive, violent, and likely to create a serious potential risk of physical injury. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) ("Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."); *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson's favor."); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) ("If any [ambiguity] did [survive], however, we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity, rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should'") (internal citation omitted); *Dowling v. United States*, 473 U.S. 207, 213 (1985) (stating that "when assessing the reach of a federal criminal

statute, . . . we typically find a 'narrow interpretation' appropriate"); *Dean v. United States*, 129 S. Ct. 1849, 1861 (2009) (Breyer, J., dissenting) (observing that "the rule of lenity [has] special force in the context of mandatory minimum provisions").

One of the policies upon which the rule of lenity is founded is that fair notice must be given "'to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). A statute mandatorily and severely enhancing punishment due to a prior conviction for a violent felony that necessarily involves the use of physical force against another person gives fair warning that violent, aggressive, injurious conduct, such as murder or rape, will trigger the enhanced punishment. It does not, however, give fair warning that slight non-consensual touching will likewise trigger the enhancement. To the extent that any ambiguity exists, then, the issue must be resolved in Mr. Johnson's favor. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (stating that "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

II. FEDERAL COURTS DECIDING WHETHER THE FLORIDA OFFENSE OF BATTERY CONSTITUTES A "VIOLENT FELONY" PURSUANT TO § 924(e)(2)(B)(i) BECAUSE IT "HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER" ARE BOUND BY THE FLORIDA SUPREME COURT'S DETERMINATION THAT BATTERY BY TOUCHING DOES NOT CONTAIN SUCH AN ELEMENT.

State courts, being the ultimate expositors of state law, define the elements of their criminal offenses. Federal courts are bound by the construction placed on a state's statutes by the courts of that state. Therefore, when the Florida Supreme Court held that the Florida battery statute does not have as an element the use or threat of physical force or violence when charged under the touching prong, that construction of that statute became binding on federal courts.

A. In *State v. Hearns*, the Florida Supreme Court held that the offense of battery by touching does not have as an element the use or threat of physical force or violence.

In Florida, "*any* intentional touching of another person against such person's will is technically a criminal battery." *D.C. v. State*, 436 So. 2d 203, 206 (Fla. App. 1983) (citing Fla. Stat. § 784.03). Also, in Florida, "injury is not an element" of simple battery. *Jackson v. State*, 533 So. 2d 888, 888 (Fla. App. 1988). Against this backdrop of battery law, the Florida Supreme Court was called upon in *State v. Hearns*, 961 So. 2d 211 (Fla. 2007), to determine whether

battery on a law enforcement officer ("BOLEO") was a "forcible felony." This determination required the state's highest court to examine the elements of battery to decide if they included "physical force." The Florida Supreme Court held that physical force was not a necessary element of battery because it could be committed by touching. *Id.* at 218-19.

A "violent career criminal" ("VCC") in Florida is one who has been convicted three times of certain enumerated felonies, including any "forcible felony." *See* Fla. Stat. § 775.084(1)(d)(1). A "forcible felony" is defined as certain other enumerated felonies or "any other felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08. The defendant in *Hearns* argued that he did not qualify for VCC sentencing because one of his prior convictions, for BOLEO, was not an enumerated felony or otherwise a "forcible felony." 961 So. 2d at 213.

Florida's test for determining whether an offense qualifies as a "forcible felony" is virtually identical to the categorical approach mandated by this Court for use by federal courts in determining whether a prior conviction constitutes a "violent felony" under the ACCA. Like the federal courts, in Florida "a court may only consider the statutory elements. The particular circumstances are irrelevant." *Id.* at 213 (citing *Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991)); *see also Taylor v. United States*, 495 U.S. 575, 602 (1989) (stating that the courts "look only to the fact of conviction and the statutory definition of the prior offense"); *Shepard*, 544 U.S. at 17 (stating that the courts do not generally consider the "particular facts disclosed by the record of conviction"). Applying this test, the *Hearns* Court stated:

> [F]or an offense to be a forcible felony under

> section 776.08, the "use or threat of physical force or violence" must be a *necessary element* of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony.

Hearns, 961 So. 2d at 215.

In considering the challenge Hearns presented to his BOLEO conviction, the Florida Supreme Court noted that "[t]he underlying conduct required for simple battery and BOLEO is identical. The only differences are the status of the victim and the penalty imposed." 961 So. 2d at 214.[19] Applying the statutory elements test, the Florida Supreme Court concluded that BOLEO was not a forcible felony. Simply put, BOLEO committed by intentional touching does not have as an element the use or threat of physical force or violence. *Id.* at 218-19.

In reaching its conclusion, the Florida Supreme Court rejected the state's argument that "any intentional touching" or "any physical contact" sufficed to make BOLEO a forcible felony. *Id.* at 218. The court noted that any intentional touching sufficed to constitute a simple battery and that "BOLEO, like battery itself, may be committed with only nominal contact." *Id.* at 218-19. The court then observed that a ruling that any intentional touching constituted a forcible felony "could lead to potentially outrageous results. For example, tapping a law enforcement officer on the shoulder without consent would constitute a forcible felony. A child shooting a spitball at a school police officer would be guilty of a

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[19] The analysis in *Hearns* is equally applicable to Mr. Johnson's case because simple battery also becomes a felony when a person has a prior conviction for battery. *See* Fla. Stat. § 784.03(2).

forcible felony. The possibilities are limited only by the imagination." *Id.* at 219.

B. The Florida Supreme Court's definitive ruling, based on a categorical analysis, that Florida's felony battery statute does not have as an element the use or threatened use of physical force because it can be charged and committed by touching, is binding on federal courts.

1. It is well-settled that state courts "have the final authority to interpret . . . that State's legislation." *Garner v. Louisiana*, 368 U.S. 157, 169 (1961). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *accord Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) (stating that "the views of the state's highest court with respect to state law are binding on the federal courts."). This Court, in fact, "repeatedly has held that state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *id.* (stating that "we accept as binding the Maine Supreme Judicial Court's construction of state homicide law"). There is thus "no doubt that we are bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993); *see also Watson v. Buck*, 313 U.S. 387, 401 (1941) ("The Florida Supreme Court . . . under our dual system of government has the last word on the construction and meaning of statutes of that state"). This, of course, includes state courts' construction of the elements of their criminal statutes. *Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979) (stating that the state law defines "the substantive elements of the

criminal offense" by which sufficiency of the evidence is determined).

In *James*, the question before this Court was "whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." *James*, 550 U.S. at 195. This Court stated that in deciding this question, it would only "consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *Id.* at 202. This Court thus looked to the elements of attempted burglary, as defined by the Florida Supreme Court, to reject the petitioner's contention that Florida's attempt statute, Florida Statute § 777.04(1), required only that a defendant take "any act toward the commission" of burglary:

> [W]hile the statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary, requiring an "overt act directed toward entering or remaining in a structure or conveyance."
>
> * * * *
>
> Given that *Florida law, as interpreted by that State's highest court*, requires an overt act directed toward the entry of a structure, we need not consider whether the more attenuated conduct encompassed by such laws presents a potential risk of serious injury under ACCA.

Id. at 202, 205-06 (citation omitted; emphasis added). In other words, the Florida Supreme Court grafted onto the offense of attempted burglary an element not necessarily required by the statutory language, and

this Court applied the Florida law as it was defined by the Florida Supreme Court.

When the petitioner in *James* argued that Florida's burglary statute differed from "generic" burglary as defined in *Taylor*, 495 U.S. at 598, because it defined a "dwelling" to include not only the structure itself, but also the "curtilage thereof" and thus fell outside the confines of the violent felony definition, the Court "again turn[ed] to state law in order to answer this question." *James*, 550 U.S. at 212-13.

> The Florida Supreme Court has construed curtilage narrowly, requiring "some form of an enclosure in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." Given this narrow definition, we do not believe that the inclusion of curtilage so mitigates the risk presented by attempted burglary as to take the offense outside the scope of clause (ii)'s residual provision.

Id. at 213 (internal citations omitted).

The Court's methodology for resolving *James* in this regard points the way to the proper resolution of Mr. Johnson's case as well, that is, by way of the Florida Supreme Court's decision in *Hearns*. The Florida Supreme Court has held that the crime of felony battery in Florida, where the battery is committed in the same manner as simple battery, does not have as "a necessary element of the crime" the "use or threat of physical force or violence." *Hearns*, 961 So. 2d at 215. Under this Court's well-settled precedent noted above, that decision definitively establishes that the elements of battery by touching in Florida do not include "physical force." The Florida Supreme Court's construction of its state

statute must be respected and followed by federal courts. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) ("[Federal courts] have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court.").

Further, the Florida Supreme Court applied an elements test to its statute, just as *Taylor* requires federal courts to do, and the reasoning in *Hearns* is consistent with the majority of the federal circuits in interpreting physical force in the context of federal enhancement statutes. *See* Part I.B., *supra*.[20] The Florida Supreme Court relied on the ordinary and natural meaning of physical force. The examples it used of conduct that constitutes battery, but that does not involve the use of physical force—"tapping a law enforcement officer on the shoulder without consent" and "shooting a spitball at a school police officer"—are enough, under the elements test, to determine that felony battery by touching is not a violent felony. 961 So. 2d at 219. Moreover, as "outrageous," *id.*, as these examples are, there exists in Florida "a realistic probability, not a theoretical possibility," *James*, 550 U.S. at 208 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)), that a felony conviction will arise due to such conduct. *See, e.g., S.D.W. v. State*, 746 So. 2d 1232, 1234 (Fla. App. 1999) (juvenile committed felony battery on a school employee when she "intentionally made contact" with

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[20] For example, Judge Easterbrook's reasoning in *Flores* was similar to that of the Florida Supreme Court in *Hearns*. He, too, relied on the elements of the state statute and the common usage of the terms "physical force" and "touch" to arrive at his conclusion that the Indiana battery conviction was not categorically a crime of violence for purposes of § 16(a). *Flores*, 350 F.3d at 669-70, 672.

vice-principal's arm, as she attempted to go by vice-principal);[21] *C.B. v. State*, 979 So. 2d 391, 395 (Fla. App. 2008) (spitting on another person is battery);[22] *Mohansingh v. State*, 824 So. 2d 1053, 1053 (Fla. App. 2002) (same); *Spivey v. State*, 789 So. 2d 1087, 1088-89 (Fla. App. 2001) (same); *Wolk v. Seminole County*, 276 F. App'x 898, 900 (11th Cir. 2008) (a brother pushing his sister's hands out of his face during an argument gave the police probable cause to arrest him for battery);[23] *Nash v. State*, 766 So. 2d 310, 310 (Fla. App. 2000) (upholding battery

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[21] Disapproved on other grounds, *N.C. v. Anderson*, 882 So. 2d 990 (Fla. 2004).

[22] Indeed, spitting appears to be a common form of battery under various state and federal laws. See, e.g., *Commonwealth v. Cohen*, 771 N.E.2d 176, 178 (Mass. App. 2001) ("We are in accord with other jurisdictions holding that an intentional and unconsented spitting on another constitutes a criminal battery.") (citing, e.g., *Jackson v. State*, 485 S.E.2d 832 (Ga. App. 1997); *People v. Peck*, 633 N.E.2d 222 (Ill. App. 1994); *State v. Sampsel*, 997 P.2d 664 (Kan. 2000)); *United States v. Lewellyn*, 481 F.3d 695, 699 (9th Cir. 2007) ("We agree with these courts that intentionally spitting on another person is an offensive touching that rises to the level of simple assault under the theory of assault as an attempted or completed battery. We therefore hold that intentionally spitting on another person falls within the ambit of "assault" under 18 U.S.C. § 113(a)(5)."). Surely, Congress did not intend for spitters to be on the same level as rapists, murders, and other superfelons.

[23] Other examples include nonconsensual tickling, *Commonwealth v. Hartnett*, 892 N.E.2d 805, 815 (Mass. App. 2008); touching and squeezing a flight attendant's buttocks, *United States v. Bayes*, 210 F.3d 64, 68-69 (1st Cir. 2000); and touching the nape of a person's neck, *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. App. 2000).

conviction where "appellant intentionally touched the victim's closely-held purse against her will").[24]

The Florida Supreme Court's holding in *Hearns*—that the Florida crime of battery by touching does not have as an element the use or threatened use of physical force—is binding on federal courts. The *Hearns* decision has the added virtue of being in consonance with common sense and with the reasoning of the majority of the federal circuits to have considered whether mere touching satisfies the physical force element of a crime of violence/violent felony definition. Accordingly, Mr. Johnson's 2002 battery conviction was not for a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another," and the decision below warrants reversal.

2. Should this Court, however, find that *Hearns* is not determinative of the issue presented here, then at the very least *Hearns* should be considered highly persuasive on the issue of whether battery under Florida law constitutes a "violent felony" for ACCA purposes. This is especially so given that the pertinent statutory language of the state "forcible felony" and federal "violent felony" provisions is virtually identical, and that, "in interpreting a federal statutory term, a court may devise a federal rule by reference to state law." *Nehme v. I.N.S.*, 252 F.3d

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[24] The law in many other states is the same. *See, e.g., Impson v. State*, 721 N.E.2d 1275, 1279, 1285 (Ind. App. 2000) (upholding battery conviction where defendant did not touch victim, but "made a smacking motion at [that person], knocking [his] glasses from his face"; ruling that the act of knocking glasses from victim's face supported defendant's battery conviction because glasses were so intimately connected with victim as to be "regarded as part of the person for purposes of the battery statute").

415, 423 (5th Cir. 2001); *see also Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) (stating that "the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums"). "Given the close similarity between the Federal and State statutes under consideration and the common purpose served by the two statutes, it is consistent with sound principles of statutory construction, that the statutes be construed harmoniously." *Art Masters Associates, Ltd. v. United Parcel Service*, 567 N.E.2d 226, 230 (N.Y. 1990). The decision in *Hearns*, then, at a minimum points the way to resolution of the circuit split because the better-reasoned view is that Congress did not intend the slightest touch to subject a person to the severe repercussions of being sentenced as an armed career criminal.

CONCLUSION

The Eleventh Circuit held that the Florida crime of battery, which can be committed by the slightest touching of another person against that person's will, is a violent felony under the ACCA because it "has as an element the use, attempted use, or threatened use of physical force against the person of another" within the meaning of § 924(e)(2)(B)(i). Defining physical force to include the slightest non-consensual touching, unaccompanied by violence, aggression, or any risk of injury, defies the ordinary, natural, and contextual meaning of that term, as well as the legislative intent behind this severe enhancement provision. Physical force, in the context of a violent felony, requires aggressive, violent conduct that is likely to create a serious potential risk of physical injury. The Florida crime of battery by touching does not categorically require such conduct. The Florida

Supreme Court has so held in a well-reasoned opinion.

In light of the foregoing, Mr. Johnson respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 08-6925

In the Supreme Court of the United States

CURTIS DARNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior conviction for felony battery under Florida law qualifies as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), because it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

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In the Supreme Court of the United States

No. 08-6925

CURTIS DARNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 81-87) is reported at 528 F.3d 1318.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. A petition for rehearing was denied on July 22, 2008 (J.A. 88). The petition for a writ of certiorari was filed on October 20, 2008, and was granted on February 23, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App. A, *infra*, 1a-5a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing ammunition after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Petitioner had prior felony convictions, entered in the State of Florida, for aggravated battery, burglary of a dwelling, and battery. The district court determined that those prior convictions, including the conviction for felony battery, qualified as "violent felon[ies]" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and thus required a mandatory minimum 15-year sentence. The court sentenced petitioner to 185 months of imprisonment. The court of appeals affirmed. J.A. 81-87.

1. Section 922(g) of Title 18, United States Code, makes it unlawful for certain persons, including any person who has previously been convicted of a felony, 18 U.S.C. 922(g)(1), to possess firearms or ammunition. Although a violation of Section 922(g) is ordinarily punishable by a maximum term of imprisonment of ten years, 18 U.S.C. 924(a)(2), the ACCA provides for a mandatory minimum of 15 years for an offender who "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

2. In 2006, a deputy with the Jacksonville, Florida, Sheriff's Office was dispatched to petitioner's home to investigate a domestic disturbance complaint. On arrival, the deputy saw petitioner inside the home holding a rifle and yelling at his girlfriend, with whom he lived at the address. Petitioner's girlfriend later explained that she and petitioner had become involved in an argument that escalated into a physical altercation. During that altercation, petitioner retrieved a rifle and loaded it with ammunition. J.A. 93-94, 121.

Petitioner was arrested. Deputies recovered a rifle, a semi-automatic pistol, and ammunition from inside the residence. J.A. 93-94. A federal grand jury in the Middle District of Florida later returned a single-count indictment charging petitioner with possessing ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1). J.A. 8-10. Petitioner pleaded guilty to the charge. J.A. 68.

3. In its Presentence Report (PSR), the Probation Office recommended that petitioner be sentenced as an armed career criminal under the ACCA because he had three prior convictions for "violent felon[ies]," all entered in the State of Florida: a 1986 conviction for aggravated battery, a 1986 conviction for burglary of

a dwelling, and a 2002 conviction for felony battery.[1] J.A. 97-98. Petitioner did not dispute that his aggravated battery and burglary convictions qualified as "violent felon[ies]." He contended, however, that his 2002 felony battery conviction did not so qualify. J.A. 134-135.

a. In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court described what it called a "formal categorical approach" for determining whether a prior conviction qualifies as a predicate for ACCA sentencing. Under that approach, a sentencing court generally may "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600. But when the statutory definition of the offense sweeps more broadly than the ACCA's generic definition of a predicate offense, the sentencing court may apply what is commonly referred to as a "modified categorical approach." *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2302 (2009). Under that approach, a court may consult additional materials, such as an indictment or information and jury instructions, to determine whether the "jury was actually required to find all the elements" required by federal law. *Taylor*, 495 U.S. at 602. When a conviction was entered by guilty plea, a court may also consider "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

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[1] Although the PSR recited that the felony battery conviction occurred in 2003 (J.A. 98), the section of the PSR outlining petitioner's criminal history showed that petitioner pleaded guilty to that crime on August 16, 2002 (J.A. 109).

b. Petitioner's felony battery conviction was entered under Fla. Stat. § 784.03(2) (2001). Under that statute, a person commits battery when he:

> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.

Id. § 784.03(1)(a). Battery is ordinarily a first-degree misdemeanor punishable by no more than one year of imprisonment. *Id.* §§ 775.082(4)(a), 784.03(1)(b). If, however, the defendant has a prior conviction for battery, aggravated battery, or felony battery, then the offense is a third-degree felony, punishable by a maximum of five years of imprisonment. *Id.* §§ 775.082(3)(d), 784.03(2).

When petitioner committed his felony battery offense in 2002, he had a number of prior misdemeanor battery convictions. According to the PSR in this case, those convictions included: a 1989 conviction for striking his girlfriend in the face and arm (J.A. 103); a 1992 conviction for a domestic-violence battery in which he punched his sister in the stomach (J.A. 103-104); and a 1993 conviction for a domestic-violence battery in which he struck his girlfriend in the head, choked her, and said that he should kill her (J.A. 104).[2]

The charging document in petitioner's 2002 battery case alleged that petitioner, "having previously been convicted of battery on July 25, 1989, did actually and intentionally touch or strike [the victim] against the will of said person, contrary to the provisions of Section

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[2] The PSR also noted that petitioner had been arrested on similar charges on other occasions. J.A. 115-116.

784.03(2), Florida Statutes," J.A. 37.[3] Petitioner pleaded guilty to the offense. J.A. 62-67. He was sentenced to time served and ordered to have no contact with the victim as a condition of community control. J.A. 65-66. Community control was later revoked, and petitioner was sentenced to three years of imprisonment. J.A. 109-110.

c. At sentencing in this case, petitioner argued that, under the *Taylor* categorical approach, felony battery in violation of Section 784.03(2) neither "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), nor "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). PSR Addendum (May 11, 2007); J.A. 19-20. Specifically, petitioner emphasized that Florida's battery statute punishes a person who "*touches* or strikes another person against the will of the other." Fla. Stat. § 784.03(1)(a) (2001) (emphasis added). Petitioner argued that "the ordinary definition of 'touch' does not connote the 'use of physical force' and does not involve 'conduct that presents a serious potential risk of physical injury to another.'" J.A. 135. Here,

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[3] The circumstances of petitioner's felony battery offense were reported in the original version of the PSR. PSR ¶ 48 (Apr. 18, 2007). Defense counsel objected to their inclusion on the ground that the information was based on an arrest report, rather than a judicial record of the sort approved in *Shepard*, 544 U.S. at 26. PSR Addendum (May 11, 2007). The probation officer disagreed, noting that, under 18 U.S.C. 3661 and Sentencing Guidelines § 1B1.4, a sentencing court may consider any information concerning the defendant in selecting an appropriate sentence, unless otherwise prohibited by law. See PSR Addendum (May 11, 2007). With the government's acquiescence, however, the court deleted the factual recitation from the PSR. J.A. 109-110; see J.A. 14-15.

petitioner contended, because the charging document alleged only that he "did actually and intentionally touch or strike [the victim]" against her will, J.A. 37, and thus could not rule out the possibility that he had been convicted for an unlawful "touching," his felony battery offense did not qualify as an ACCA predicate, J.A. 19-21.

The district court rejected the argument. The court agreed with the Probation Office that felony battery in violation of Fla. Stat. § 784.03(2) both necessarily involves the use of physical force, for purposes of 18 U.S.C. 924(e)(2)(B)(i), and presents a serious potential risk of physical injury, for purposes of 18 U.S.C. 924(e)(2)(B)(ii). J.A. 47, 49. The court sentenced petitioner to 185 months of imprisonment, to be followed by five years of supervised release. J.A. 57, 70-71. The court explained that the sentence was based on petitioner's "very, very strong criminal history," and that petitioner was "classified as an armed career criminal because of [his] prior convictions for violent felonies." J.A. 59.

4. On appeal, petitioner renewed his contention that Florida's battery statute neither "has as an element the use, attempted use, or threatened use of physical force," nor "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B); see Pet. C.A. Br. 8-9, 12-19; Pet. C.A. Reply Br. 1-10.

The court of appeals affirmed petitioner's sentence, concluding that felony battery qualifies as a "violent felony" under Subsection (i) of the ACCA definition. J.A. 82-87. Relying on circuit precedent, the court explained that, because "[t]he crime of battery under Florida law * * * requires at a minimum the actual and intentional touching or striking of another person against that other

person's will," it has as an element "'the use, attempted use, or threatened use of physical force against the person of another.'" J.A. 82-83 (quoting 18 U.S.C. 924(e)(2)(B)(i)); see *United States* v. *Llanos-Agostadero*, 486 F.3d 1194, 1197 (11th Cir. 2007) (per curiam) (holding that the Florida offense of aggravated battery on a pregnant woman qualifies as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)), cert. denied, 129 S. Ct. 902 (2009); *United States* v. *Glover*, 431 F.3d 744, 749 (11th Cir. 2005) (per curiam) (holding that the Florida offense of battery on a law enforcement officer qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2(a)).

The court of appeals rejected petitioner's argument that its prior decisions had been undermined by *State* v. *Hearns*, 961 So. 2d 211 (2007), in which the Florida Supreme Court held that battery was not a "forcible felony" for purposes of the Florida violent career criminal statute. J.A. 83-86. The court explained that its prior cases "applied the federal law definition of 'violence' with the understanding that any actual touching or striking of another against that other person's will is simple battery under Florida law." J.A. 84-85. *Hearns*, the court noted, did not alter that understanding. J.A. 85. And because "[t]he issue of whether [the ACCA] applies to the state law defined crime of battery is a federal question, not a state one," the court concluded that "nothing that the Florida Supreme Court said in *Hearns* about that state's violent career criminal statute binds us." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that petitioner's conviction for felony battery in violation of

Florida law qualifies as a "violent felony" under the ACCA because battery "has as an element the use * * * of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

A. Florida's definition of battery tracks the traditional, common-law rule. Under that rule, a person commits battery if he applies force to another in a manner that results either in physical injury or in an offensive touching. Because the statutory definition of Florida's battery offense proscribes the application of physical force to another person, it qualifies as an offense that "has as an element the use * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i).

B. Petitioner contends that the statutory context of the ACCA's definition of "violent felony" limits the meaning of "physical force" to "physical force" that is "violent" and "aggressive," which petitioner understands to mean force that is "likely to create a serious potential risk of physical injury." Br. 8, 9, 18 (emphasis omitted). Petitioner would thus read the language of Subsection (ii)—and of this Court's opinion interpreting that language in *Begay* v. *United States*, 128 S. Ct. 1581 (2008)—into Subsection (i) as an implicit qualification on "physical force." But Congress did not include that qualification in Subsection (i), and the effort to rewrite the statute should be rejected.

Petitioner's proposal rests on the erroneous assumption that, in the context of the ACCA, a "violent" crime must necessarily involve the use of "violent," potentially injurious force. Congress intended the ACCA to reach not only crimes that in themselves present a risk of injury, but also crimes likely to lead to confrontations that present a risk of injury. Battery, of course, typically involves conduct that in itself presents a risk of injury to

others. But even in the atypical battery case that does not involve the use of potentially injurious force, the offender's conduct could well lead to a volatile and dangerous confrontation. Congress thus could reasonably have concluded that a crime that necessarily involves the use of physical force against persons should categorically qualify as a "violent felony," regardless of the particular quantum of force involved.

Petitioner further asserts that, absent his narrowing construction, "an unwanted tap on the shoulder" could constitute a "violent felony" under the ACCA. But he offers no evidence that the Florida battery statute has been applied to shoulder-tapping or similar conduct. And in any event, the statutory context of the ACCA does not demand that every conceivable factual offense covered by the language of a state criminal statute present a serious risk of physical injury or otherwise conform to a preconceived notion of what constitutes a crime of violence. The ACCA focuses on ordinary cases, not extraordinary ones. In the ordinary case, battery is, by any definition, a violent crime.

C. Because the text of Section 924(e)(2)(B)(i) is clear and unambiguous, there is no need to consult its legislative history. That history, in any event, confirms the plain meaning of the text, and nothing in the statute's history suggests any intention to exclude battery from its compass.

D. As the reported cases demonstrate, the interpretive question presented in this case has arisen most often in cases concerning federal domestic-violence provisions, particularly the federal ban on firearm possession by persons convicted of misdemeanor crimes of domestic violence, 18 U.S.C. 922(g)(9). Section 922(g)(9), much like Section 924(e)(2)(B)(i), employs a definition of "mis-

demeanor crime of domestic violence" that is limited to any crime that "has, as an element, the use * * * of physical force." 18 U.S.C. 921(a)(33)(A).

As this Court has recently explained, Congress enacted Section 922(g)(9) to provide a nationwide solution to what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. *United States* v. *Hayes*, 129 S. Ct. 1079, 1087 (2009). Congress did so with the understanding that "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Ibid.* But the generic assault and battery laws of about half of the States, like Florida's, do not draw distinctions between different degrees of force. If the Court were to conclude that such offenses lack a use-of-force element for purposes of the firearms disability provision, then relatively few domestic-violence convictions would qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9).

E. The Florida Supreme Court's decision in *State* v. *Hearns*, 961 So. 2d 211 (2007), does not support the conclusion that Florida's battery statute lacks a use-of-force element under Section 924(e)(2)(B)(i). The outcome in that case rested not on an interpretation of Florida's battery statute, but rather on an interpretation of a different state statute that is not at issue here, and that differs in material ways from Section 924(e)(2)(B)(i). As such, *Hearns* is neither binding nor persuasive authority for the proposition that battery is not categorically a "violent felony" under Section 924(e)(2)(B)(i).

F. The rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. Section 924(e)(2)(B)(i) unambiguously includes felony battery as defined by Florida law.

G. Finally, even if the Court were to accept petitioner's restrictive reading of Section 924(e)(2)(B)(i), the proper course would not be to reverse the judgment of the court of appeals, but rather to vacate the judgment and allow the court of appeals to consider whether, as the district court held, felony battery qualifies as a "violent felony" under the so-called residual provision of Section 924(e)(2)(B)(ii).

ARGUMENT

PETITIONER'S FELONY BATTERY OFFENSE HAS AS AN ELEMENT THE USE OF PHYSICAL FORCE AGAINST ANOTHER, AND THEREFORE QUALIFIES AS A "VIOLENT FELONY" UNDER 18 U.S.C. 924(e)(2)(B)(i)

Florida, like many States, punishes as a criminal offense the unjustified and offensive application of physical force of any degree to another person. That offense—traditionally known as "battery," but also known in some jurisdictions as "assault" or "assault and battery"—"has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Petitioner's felony battery offense under Florida law therefore qualifies as a "violent felony" under the ACCA.

A. The Plain Language Of Section 924(e)(2)(B)(i) Encompasses Felony Battery

The ACCA defines the term "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another," or "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct

that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B).

1. As relevant here, the use-of-force element required by the definition of "violent felony" in subsection (i) of the ACCA has two principal components: (1) "physical force," that is (2) "use[d] * * * against the person of another." 18 U.S.C. 924(e)(2)(B)(i).[4]

The term "physical force," which is undefined in the statute, ordinarily means "[f]orce applied to the body; actual violence." *Black's Law Dictionary* 1032 (5th ed. 1979) (*Black's*). "Force" is variously defined as "[p]ower dynamically considered," *id.* at 580; "[s]trength or power, of any degree, exercised without law, or contrary to law, upon persons or things"; or "violence." *Webster's New International Dictionary of the English Language* 986 (2d ed. 1958) (*Webster's Second*).

This Court considered the meaning of the phrase "use * * * against" in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which concerned whether driving under the influence (DUI) and causing bodily injury qualifies as a "crime of violence" under 18 U.S.C. 16. The Court concluded that it does not, because "'use . . . of physical force against the person or property of another' * * * most naturally suggests a higher degree of intent than negligent or

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[4] It is undisputed that petitioner's recidivist felony battery qualifies as "a crime punishable by a term of imprisonment exceeding one year," 18 U.S.C. 924(e)(2)(B), even though, absent the recidivism enhancement, petitioner's battery offense would have been punishable as a misdemeanor. See J.A. 86 (citing *United States* v. *Rodriquez*, 128 S. Ct. 1783 (2008)); *Rodriquez*, 128 S. Ct. at 1793 (holding that, for purposes of the ACCA's neighboring definition of "serious drug offense," the "maximum term of imprisonment * * * prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii), is properly determined by reference to recidivist sentence enhancements); Fla. Stat. §§ 775.082(3)(d) and (4)(a), 784.03(1)(b) and (2) (2001).

merely accidental conduct." *Leocal*, 543 U.S. at 9 (quoting 18 U.S.C. 16(a)). The Court explained that the word "use" denotes "active employment." *Ibid.* (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)). And "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Ibid.*; cf. *Black's* 57 (defining "[a]gainst" as "adverse to, contrary," and noting that it generally "[s]ignifies discord or conflict; opposed to; without the consent of; in conflict with"). For example, the Court explained, while "we would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him," "a person would 'use . . . physical force against' another when pushing him." *Leocal*, 543 U.S. at 9.

2. The language of Section 924(e)(2)(B)(i) precisely tracks the general definition of the crime of battery: "the unlawful application of force to the person of another." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15, at 301 (1st ed. 1986) (*LaFave*); accord *Black's* 139.

Battery is generally considered to consist of a specified *actus reus*, *mens rea*, and "harmful result to the victim." *LaFave* § 7.15, at 301. Although the "modern approach, as reflected in the Model Penal Code" in some state criminal codes, is "to limit battery to instances of physical injury," *id.* § 7.15(a), at 302, about half of the States, by explicit statutory text or judicial interpretation, follow the traditional, common-law approach, under which the required "harmful result" may be *either*

"a bodily injury or an offensive touching." *Id.* § 7.15, at 301; see App. B, *infra*, 6a-11a.[5]

The common-law approach reflects a judgment that "the least touching of another in anger" constitutes a form of "violence against the other." *Cole* v. *Turner*, 90 Eng. Rep. 958 (1704). As Blackstone explained:

> The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

3 William Blackstone, *Commentaries* *120 (*Blackstone*) (discussing battery as a private wrong); see 4 *id.* at *216-*218 (noting that battery is also a public wrong, and referring to prior discussion of battery as a private wrong).

Not all subjectively unwanted physical contact qualifies as battery under the common-law approach. The law recognizes that, "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted." W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 9, at 42 (5th ed. 1984) (*Prosser*). An individual is thus generally assumed to consent "to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life": neither "a tap on the shoulder to attract attention," nor "a friendly grasp of the arm," nor "a casual jostling to make passage" is considered a battery. *Ibid.* To qualify as a battery, the contact must be objectively offensive, and "unwarranted by the social usages prevalent at the time and place at which

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[5] A number of States, as well as the federal government, punish the traditional elements of battery as "assault" or "assault and battery." See *LaFave* § 7.14, at 300 & nn.2, 3; App. B, *infra*, 6a-11a.

it is inflicted." Restatement (Second) of Torts § 19 cmt. a, at 35 (1965).

Florida, which defines battery as "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other" or "[i]ntentionally caus[ing] bodily harm to another person," follows the common-law approach of including the causation of both bodily injury and of offensive touching in a single crime. Fla. Stat. § 784.03(1)(a) (2001); cf. *United States* v. *Hays*, 526 F.3d 674, 678-679 (10th Cir. 2008) (recognizing that a similarly worded Wyoming battery statute follows the same approach); *Flores* v. *Ashcroft*, 350 F.3d 666, 669-670 (7th Cir. 2003) (recognizing that a similarly worded Indiana battery statute follows the same approach).

3. Petitioner does not dispute that the "intentionally caus[ing] bodily injury" prong of the Florida battery statute necessarily involves the use of physical force. He contends, however, that the "intentionally touch[ing] or strik[ing]" prong does not, because "touch[ing]" does not require the use of physical force. *E.g.*, Br. 18.

As a textual matter, petitioner is incorrect. An intentional offensive "touch[ing]" necessarily involves "the unlawful application of force to the person of another." *LaFave* § 7.15, at 301. As the courts of appeals have acknowledged, even the slightest touch necessarily involves the use of some quantum of physical force. See *United States* v. *Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006) ("A person cannot make physical contact * * * with another without exerting some level of physical force."), cert. denied, 549 U.S. 1343 (2007); *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001) ("[O]ffensive physical contacts with another person's body * * * invariably emanate from the application of some quantum of physical force."); *United States* v. *Smith*, 171 F.3d 617,

621 n.2 (8th Cir. 1999) ("[P]hysical contact, by necessity, requires physical force to complete."); cf. *Flores*, 350 F.3d at 672 (acknowledging that "it is impossible to touch someone without applying *some* force, if only a smidgeon").

Accordingly, battery under Florida law falls within the plain meaning of "any crime * * * that * * * has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). See *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 621 n.2; see also *Blake* v. *Gonzales*, 481 F.3d 152, 159-160 (2d Cir. 2007) (Sotomayor, J.) (concluding that the variant of the Massachusetts offense of assault and battery on a police officer that requires proof of "'the intentional and unjustified use of force upon the person of another, however slight,'" "[c]learly constitutes 'the use . . . of physical force' within the meaning of § 16(a)") (citation omitted).

B. The Context Of Section 924(e)(2)(B)(i) Supports Its Plain Meaning

Petitioner's primary submission is that, to distinguish "violent" crimes from other crimes, Section 924(e)(2)(B)(i)'s reference to "physical force" must be read to mean force that is "aggressive, violent, and likely to create a serious potential risk of physical injury." Br. 18. A "violent felony," in petitioner's view, thus must "have as an element the use of violent, destructive, aggressive, and/or injurious force." Br. 26. So read, petitioner concludes, Subsection (i) of the ACCA definition would not reach as a categorical matter any felony battery conviction entered in a jurisdiction, like Florida, that draws no distinction between degrees of force. Peti-

tioner provides no valid reason for this Court to interpret Section 924(e)(2)(B)(i) in that manner.

1. Congress's use of the unqualified term "physical force" suggests that Congress did not intend to limit the ACCA to only certain criminal uses of physical force

As petitioner acknowledges (Br. 11-16), his proposed narrowing construction of Subsection (i) is drawn largely from Subsection (ii), which reaches any crime that "is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); see *Begay* v. *United States*, 128 S. Ct. 1581, 1586 (2008) (interpreting the so-called residual clause of Subsection (ii) to reach crimes that are both risky and that, like the offenses enumerated in Subsection (ii), "typically involve purposeful, 'violent,' and 'aggressive' conduct") (quoting *United States* v. *Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), rev'd, 128 S. Ct. 1581 (2008)). Petitioner reasons that Subsection (i), like Subsection (ii), must be intended to reach "violent, aggressive conduct likely to create a serious potential risk of physical injury." Br. 16. And in petitioner's view, the way to ensure that Subsection (i) is limited to such conduct is to read its reference to "physical force" to mean "physical force" that is "aggressive, violent, and likely to create a serious potential risk of physical injury." *Id.* at 18.

Congress, however, has defined what constitutes a "violent felony" under Subsection (i), and Congress's definition includes any felony offense that "has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Had Congress

intended to limit its definition of "violent felony" to some unlawful uses of physical force but not others, it would have said so. This Court should decline to superimpose the language of Subsection (ii) on the use-of-force language of Subsection (i), when Congress did not see fit to do so itself. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original; internal quotation marks and citation omitted).[6]

Moreover, Congress has elsewhere employed limiting language of the sort that petitioner here proposes: federal firearms laws prohibit firearm possession by any person who is subject to a court order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury*." 18 U.S.C. 922(g)(8)(C)(ii) (emphasis added); see *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16. That Congress failed to include a similar limitation in Subsec-

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[6] Petitioner emphasizes (Br. 15-16) this Court's observation that "[a] crime which has as an element the 'use, attempted use, or threatened use of physical force' against the person * * * is likely to create 'a serious potential risk of physical injury.'" *Begay*, 128 S. Ct. at 1585. But that observation provides no support for superimposing the "serious potential risk" language of Subsection (ii) on the "physical force" language of Subsection (i). As explained below, pp. 21-30, *infra*, a crime involving the use of force against another person by its nature creates a risk of injury, regardless of the quantum of force involved.

tion (i) of the ACCA suggests that no such limitation was intended.[7]

This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997). See, *e.g.*, *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1788-1789 (2008) (declining to read the ACCA's reference to "the maximum term of imprisonment prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii), to mean "'the maximum term of imprisonment prescribed by law' for a defendant *with no prior convictions that trigger a recidivist enhancement*"); see also, *e.g.*, *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) (noting that the Court has generally "refused to adopt narrowing constructions" of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, "in order to make it conform to a preconceived notion of what Congress intended to proscribe"); *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980) (read-

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[7] Petitioner contends (Pet. Br. 25-27) that no inferences can be drawn from the language of Section 922(g)(8)(C)(ii) because that provision was added to Section 922(g) in 1994, two years before Congress would enact the definition of "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9). Although petitioner does not mention it, Section 922(g)(8)(C)(ii) was also enacted at a different time from the ACCA, which took its present form in 1986. See pp. 33-34, *infra*.

At a minimum, the language of Section 922(g)(8)(C)(ii) demonstrates that Congress knows how to limit the meaning of "physical force" when it wants to do so. Moreover, Section 922(g)(8)(C)(ii) was enacted at the same time as other provisions that used the generic use-of-force language without further qualification, suggesting that Congress did in fact act "intentionally and purposely" in attaching the bodily-injury qualifier to Section 922(g)(8)(C)(ii). *Russello*, 464 U.S. at 23 (internal quotation marks and citation omitted); see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(e)(3), 108 Stat. 2014; see also, *e.g.*, *id.* § 70001(2), 108 Stat. 1982 (18 U.S.C. 3559(c)(2)(F)(ii)); *id.* § 150001, 108 Stat. 2033 (18 U.S.C. 521(c)(2)).

ing the reference to "laws" in 42 U.S.C. 1983 to "mean[] what it says," rather than being "limited to some subset of laws"). There is no reason for the Court to depart from its usual practice here.

2. The ACCA reaches crimes that pose an inherent risk of harm to persons, including those that do not themselves involve the deployment of injurious force

In any event, petitioner's proposal to add limiting words to the statutory reference to "physical force" rests on a fundamental misconception about the statutory context: It assumes that, in the ACCA, a "violent felony" must necessarily involve the use of "violent" and "injurious" force. See, *e.g.*, Pet. Br. 18, 26. The plain text of the ACCA shows that assumption to be false.

a. The concept of violence embodied in the ACCA, as the text of Subsection (ii) itself makes clear, is not limited to crimes that in themselves involve the use of potentially injurious physical force. Rather, in drafting the definition, Congress included both crimes that in themselves "create significant risks of bodily injury," and other crimes that create "significant risks * * * of *confrontation* that might result in bodily injury." *James* v. *United States*, 550 U.S. 192, 199 (2007) (emphasis added). Burglary, for example, is a "violent felony" not because it necessarily involves the deployment of injurious force against another person—it does not, see *Taylor* v. *United States*, 495 U.S. 575, 596-597 (1990)—but because it creates a risk of confrontation that might result in injury, see *id.* at 588 (noting that Congress "singled out burglary" because it "often creates the possibility of a violent confrontation"); *James*, 550 U.S. at 203 ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather

from the possibility of a face-to-face confrontation between the burglar and a third party.").

Similarly, as this Court noted in *Chambers* v. *United States*, 129 S. Ct. 687 (2009), the question whether prison escape and related offenses qualify as "violent felon[ies]" turns not on whether those offenses themselves involve the deployment of potentially injurious force—again, they need not—but on the likelihood that the offender will "attack, or physically * * * resist, an apprehender, thereby producing 'a serious potential risk of physical injury.'" *Id.* at 692 (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

b. Unlike burglary, for example, a completed battery offense typically does involve the deployment of potentially injurious force. See, *e.g.*, *State* v. *Bagley*, 697 So. 2d 1246, 1246 (Fla. Dist. Ct. App. 1997) (conviction for battery, where defendant "hit [his girlfriend] about the body and face approximately nine times," causing "severe swelling on the side of her face"); *Boroughs* v. *State*, 684 So. 2d 274, 275 (Fla. Dist. Ct. App. 1996) (convictions for battery and sexual battery, where defendant forced his girlfriend to perform a sexual act and during the act "punched her on the side of her head with his fist"; and later "struck and kicked [her] when he became angry at her for not doing the laundry," causing "bruises about her body, including a black eye, bruises on her left arm, left leg and under her left breast").

Although the "touching or striking" prong of Florida's definition of battery does not, by its terms, require proof that the defendant's conduct resulted in "bodily harm," Fla. Stat. § 784.03(1)(a)(2) (2001), cases specifically prosecuted on a "touching or striking" theory demonstrate that the conduct proscribed by that provision is also likely to, and indeed often does, result in physical injury. See *Jomolla* v. *State*, 990 So. 2d 1234, 1237 (Fla. Dist. Ct.

App. 2008) (defendant convicted of "actually and intentionally touching or striking" the victim in violation of Section 784.03(1)(a)(1), where defendant punched the defendant in the face and hit him with a cane, "causing the cane to break and [the victim] to suffer a lesion requiring four stitches over his right eye"); *Byrd* v. *State*, 789 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2001) (per curiam) (jury found defendant guilty of battery on a "touching or striking" theory, where, after an argument, defendant drove his car at his sister in an apparent attempt to run her over); see also *State* v. *Clyatt*, 976 So. 2d 1182, 1182-1183 (Fla. Dist. Ct. App. 2008) (defendant prosecuted for felony battery for "touching or striking" the victim, based on an incident in which the defendant was observed "beating [the victim's] head against the car window; slapping and punching her in the face; grabbing her; and then choking her").

c. As petitioner notes (Br. 10-11), there are a handful of reported cases in which defendants have been found guilty of the elements of Fla. Stat. § 784.03 for conduct that does not itself involve the deployment of injurious force. But contrary to petitioner's suggestion (Br. 18), the mere existence of those cases does not mean that battery is overbroad such that it is not a categorically violent offense for ACCA purposes.

The unjustified application of physical force to another person, regardless of degree, has long been understood as a confrontational act associated with escalating violence. See, *e.g.*, *Respublica* v. *Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Pa. Oyer & Terminer 1784) ("[T]hough no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal difinition [sic] of Assault and Battery, and among gentlemen, too often induce duelling, and termi-

nate in murder."); 1 Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law* 6 (1906) ("The hostile hitting or touching, though it falls short of an actual hurt, is treated as a battery because it tends to provoke a quarrel and is in fact itself a breach of the peace."). What has historically been true remains true today. Intentionally touching another person in an objectively offensive manner is a confrontational act that "may readily lead to an escalation of violence." *Hays*, 526 F.3d at 683 (Ebel, J., dissenting).

The atypical applications of Florida's generic definition of battery cited in petitioner's brief (at 40-41) are consistent with that view. The defendant in *Spivey* v. *State*, 789 So. 2d 1087 (Fla. Dist. Ct. App. 2001), for example, did not merely "spit[] on another person," but spat in the face of a law enforcement officer after fighting with him and knocking the night stick from his hand. *Id.* at 1088-1089; see also *C.B.* v. *State*, 979 So. 2d 391, 393, 395 (Fla. Dist. Ct. App. 2008) (juvenile spat in an officer's face while "actively resist[ing]" the officer's efforts to restrain and transport her); *Mohansingh* v. *State*, 824 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 2002) (defendant spat on officer preventing him from reentering nightclub to locate person who had earlier struck him, after growing "increasingly agitated, angry, and loud"). The juvenile in *S.D.W.* v. *State*, 746 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1999) did not merely "ma[k]e contact" with a school official's arm, see Pet. Br. 40; she pushed the restraining arms of the school official aside in an effort to enter a fight. 746 So. 2d at 1234. And the defendant in *Nash* v. *State*, 766 So. 2d 310 (Fla. Dist. Ct. App. 2000) did not merely brush past the victim's "closely-held purse," see Pet. Br. 41-42, but, after de-

manding the purse from the victim, reached into the victim's disabled vehicle and struggled with her for the purse until the purse was broken from its handles. 766 So. 2d at 310. In each case, the battery, though involving the use of noninjurious force, was committed in the midst of a volatile confrontation that could well have led to escalating violence and ultimately to injury.

d. In short, petitioner provides little reason to think that, even though Congress attached no modifiers to the term "physical force," it nevertheless intended to capture only some subset of crimes involving the use of "physical force" against another person. Cf. *Thiboutot*, 448 U.S. at 4. The Congress that enacted the ACCA could reasonably have concluded that any felony offense involving the use of physical force against other persons inherently poses sufficient potential for harm that it should categorically qualify as a "violent felony," regardless of the quantum of force involved.

3. The ACCA's categorical approach classifies crimes based on the risks present in ordinary cases, not extraordinary cases

Petitioner's argument (Br. 15-22) also fails because it rests on the premise that some narrowing construction of Section 924(e)(2)(B)(i) is needed to ensure that each and every factual offense, both actual and hypothetical, that could fall under that provision necessarily "presents a serious potential risk of physical injury." If, as petitioner posits, "battery * * * can be committed merely by an unwanted tap on the shoulder," Br. 8, then, in petitioner's view, battery cannot categorically qualify as a "violent felony," and the definition of "violent felony" must be modified to exclude generic battery, as a formal categorical matter, from its scope.

That argument, too, rests on a fundamental misconception about the relevant statutory context. In the ACCA, Congress used "uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Taylor*, 495 U.S. at 590. The ACCA's categorical approach necessarily focuses on "the ordinary case," not hypothetical or extraordinary cases. *James*, 550 U.S. at 208. Petitioner errs in attempting to isolate potential means of committing an offense that do not pose a risk of violence, without any regard to the frequency of such cases in actual practice.

a. As an initial matter, petitioner's argument falters because it rests largely on the "application of legal imagination to a state statute's language," *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007), rather than on evidence of how the Florida battery statute has been applied in practice.

Petitioner argues that Fla. Stat. § 784.03 could be applied to essentially harmless conduct, but makes no effort to "show that the statute was so applied in his own case." *Duenas-Alvarez*, 549 U.S. at 193. Like others who have made similar arguments, petitioner does not dispute that his own battery conviction was based on anything other than an act of "[v]iolence and aggression," nor does he dispute that his criminal conduct presented "a serious potential risk of physical injury" to his victim. Br. 15; see, *e.g.*, *Flores*, 350 F.3d at 670 ("Now Flores did not tickle his wife with a feather during a domestic quarrel, causing her to stumble and bruise her arm. That would not have led to a prosecution, let alone to a year's imprisonment. The police report shows that Flores attacked and beat his wife even though prior violence had led to an order barring him from having any contact with her.");

United States v. *Belless*, 338 F.3d 1063, 1068-1069 (9th Cir. 2003) ("The record indicates that Belless was charged with conduct that was a violent act and not merely a rude or insolent touching."); see also *Griffith*, 455 F.3d at 1341 (defendant argued that his Georgia simple battery conviction did not qualify as a "misdemeanor crime of domestic violence," where the factual offense underlying the conviction involved "making 'contact of an insulting and provoking nature'" by "'hitting'" his wife "'dragging her across the floor'").

Moreover, petitioner does not point to "other cases in which the state courts in fact did apply" Florida's battery statute to, for example, a person who tapped another on the shoulder. *Duenas-Alvarez*, 549 U.S. at 193. Petitioner instead relies on the Florida Supreme Court's speculation that shoulder-tapping could constitute a battery. Br. 36 (citing *State* v. *Hearns*, 961 So. 2d 211, 219 (Fla. 2007)). Petitioner similarly relies on judicial speculation that a person could, for example, be convicted of battery for "throwing 'a snowball, spitball, or paper airplane,' or water at one's spouse or domestic partner." *Id.* at 21 (quoting *Hays*, 526 F.3d at 679).

Such imaginings should, however, be treated as such. For one thing, the law generally assumes consent to ordinary physical contact. See pp. 15-16, *supra*. Thus, although the court in *Hearns* speculated that a tap on the shoulder might give rise to a battery conviction, 961 So. 2d at 219, the law is generally to the contrary. See *Prosser* § 9, at 42 (noting that "a tap on the shoulder to attract attention" is not a battery); cf. *McDonald* v. *Ford*, 223 So. 2d 553, 554-555 (Fla. Dist. Ct. App. 1969) (concluding, in a civil tort case, that the defendant's initial "laughing[] embrace[]" of the plaintiff, as distinguished

from her later struggle to free herself, resulting in injury, did not constitute an assault and battery).

In any event, as the courts themselves have recognized, criminal prosecution is not costless, and minor slights of the sort they have imagined are unlikely to give rise to criminal convictions. See *Flores*, 350 F.3d at 670; see also *id.* at 672 (Evans, J., concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims."); *Hays*, 526 F.3d at 683 n.3 (Ebel, J., dissenting) (noting that "only incidents that were sufficiently severe to require police intervention and ultimately support a criminal prosecution and conviction" will lead to a prosecution under 18 U.S.C. 922(g)(9) for possessing a firearm after a "misdemeanor crime of domestic violence").

Petitioner does, of course, point to decided cases in which Florida's battery statute has been applied to conduct that does not involve the use of force capable of causing injury. Br. 40-42. But for the reasons explained above, see pp. 21-25, *supra*, a particular battery offense might not itself involve the use of potentially injurious force and yet carry a serious risk that the offender's conduct will lead to a volatile and dangerous confrontation resulting in injury.

b. Even assuming, however, that there may be concrete instances in which a battery case may not involve a genuine risk of either injury or confrontation that might lead to injury, that does not mean that battery is a categorically nonviolent crime. As this Court explained in *James*, even the second clause of the ACCA definition, which explicitly requires that an offense "involve[] conduct that presents a serious potential risk of physical injury," does not insist that "every conceivable factual offense covered by a statute must necessarily present a

serious potential risk of physical injury before the offense can be deemed a violent felony." 550 U.S. at 208. As the Court noted:

> One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury—for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets. Or, to take an example from the offenses specifically enumerated in § 924(e)(2)(B)(ii), one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments. In both cases, the risk of physical injury to another approaches zero. But that does not mean that the offenses of attempted murder or extortion are categorically nonviolent.

Ibid. (citation omitted); see also *id.* at 207 (imagining "a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors"); *Taylor*, 495 U.S. at 597 ("Congress presumably realized that the word 'burglary' is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force.").

Each year Florida courts enter thousands of battery convictions under Fla. Stat. § 784.03.[8] Petitioner asks this Court to conclude, based on a handful of cases, real and imagined, that battery under Florida law is not a categorically "violent" crime, that it does not categori-

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[8] According to Florida's Office of the State Courts Administrator, the Florida Offender Based Transaction System shows that approximately 6000 individuals were convicted under Fla. Stat. § 784.03 in Fiscal Year 2007-2008.

cally present a "serious potential risk of physical injury," and that it therefore should not be considered to involve the use of "physical force" for purposes of Section 924(e)(2)(B)(i). Br. 16. That conclusion is not only "divorced from common sense," *Flores*, 350 F.3d at 672 (Evans, J., concurring), but inconsistent with the statutory context of Section 924(e)(2)(B)(i).

4. Petitioner's proposed narrowing construction would unnecessarily cloud a clear statutory text

Finally, petitioner's proposed narrowing construction would convert the relatively straightforward, objective test for determining whether a crime qualifies as a "violent felony" under Subsection (i) of the ACCA definition into a decidedly more complex, qualitative inquiry consciously modeled on the inquiry prescribed by Subsection (ii) of that definition. See Br. 14-16 (citing *Begay*, 128 S. Ct. at 1585, 1586 (2008)). The inquiry whether a crime "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), as this Court has noted, "requires judges to make sometimes difficult evaluations," *James*, 550 U.S. at 210 n.6. That difficulty is perhaps reflected in the number of Subsection (ii) cases that have recently come to this Court for resolution. See *Chambers*, *supra* (considering whether failure to report to prison qualifies as a "violent felony" under Subsection (ii)); *Begay*, *supra* (felony DUI); *James*, *supra* (attempted burglary). There is little reason to think that Congress would have intended that result.

Moreover, however formulated, petitioner's proposal to limit the meaning of "physical force" to force exceeding a certain threshold would require courts to answer precisely the question that the law of battery has tradi-

tionally sought to avoid: How much physical force is enough? Cf. 3 *Blackstone* *120 ("[T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it.").

Petitioner, evidently, would draw the line between a "touch" and a "strike." See, *e.g.*, Br. 10; cf. *Flores*, 350 F.3d at 672 (suggesting a "qualitative" distinction between "[a]n offensive touching" and "a punch"). But the line between intentionally and offensively "touch[ing]" another person and "strik[ing]" another person is hardly self-defining. Fla. Stat. § 784.03(1)(a)(1) (2001); see *Webster's Second* 2676 (defining the verb "touch" as, *inter alia*, "[t]o hit or *strike* lightly") (emphasis added); *id.* at 2496 (defining the verb "strike" as, *inter alia*, "[t]o *touch* or hit with some force") (emphasis added). As Judge Ebel noted in *Hays*, "[o]nce we start down the slippery slope * * * of qualifying what constitutes 'physical force,' our work will never be done." 526 F.3d at 681 (Ebel, J., dissenting).

C. Legislative History Provides No Support For Petitioner's Reading Of Section 924(e)(2)(B)(i)

Petitioner contends (Pet. 27-30) that the ACCA's legislative history confirms that Congress did not intend to include felony battery within the compass of its definition of "violent felony." Because the language of Section 924(e)(2)(B)(i) is clear and consistent with its statutory context, there "is no need for [the Court] to inquire beyond the plain language of the statute." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). But to the extent that legislative history is relevant, it supports reading Section 924(e)(2)(B)(i) to mean what it says, rather than reading it, as petitioner urges, to exclude felony battery from its scope.

1. The ACCA was first enacted as Chapter 18 of the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, which "broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement, and which added a variety of new violent and nonviolent offenses." *Leocal*, 543 U.S. at 5. As originally written, the ACCA provided for enhanced sentencing for firearms violators with three prior convictions for burglary or robbery. 18 U.S.C. App. 1202 (1982 & Supp. III 1985) (repealed by Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459); see *Taylor*, 495 U.S. at 581-582.

In a separate provision of the CCCA, Congress provided a general definition of the term "crime of violence," a term used in various provisions of the Act, and which has since been incorporated into several additional statutory provisions. CCCA § 1001(a), 98 Stat. 2136 (18 U.S.C. 16); see *Leocal*, 543 U.S. at 6-7 & n.1. That definition includes any offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 16(a), as well as any felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16(b).

In a report describing language that would ultimately be incorporated into the final legislation, the Senate Judiciary Committee explained that, while the second prong of that definition would include "felon[ies] * * * such as burglary," the first prong would include a "felony or a misdemeanor" offense such as "threatened or attempted simple assault or battery on another person." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (*1983 Sen-*

ale Report) (citing 18 U.S.C. 113(d) and (e) (1982), now codified as amended at 18 U.S.C. 113(a)(4) and (5)).[3]

2. Two years after the ACCA was first enacted, Congress amended the statute to broaden the range of predicate offenses for enhanced sentencing. Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. The drafters of the legislation used the Section 16 definition of "crime of violence" as its template for a new definition of ACCA predicates. The first legislative proposal, introduced in the Senate by Senator Specter and in the House of Representatives by Representative Wyden, in fact used the term "crime of violence," and defined the term in a manner identical to Section 16. S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986); see *Taylor*, 495 U.S. at 583. An alternative proposal, introduced in the House by Representatives Hughes and McCollum, employed a modified version of just the first prong of the Section 16 definition: "any State or Federal felony that

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[3] The two federal statutory provisions specifically cited in the 1983 Senate Report as falling within the first prong of the definition prohibited "[a]ssault by striking, beating, or wounding," 18 U.S.C. 113(d) (1982), and "[s]imple assault," 18 U.S.C. 113(e) (1982). Although Section 113 did not define "assault," courts had previously held that other federal assault provisions reached noninjurious offensive touchings. See *United States* v. *Masel*, 563 F.2d 322, 323 (7th Cir. 1977) (interpreting 18 U.S.C. 351(e) (1970), which punishes any person who "assaults" certain high-ranking government officials, to reach spitting in the face of a United States Senator), cert. denied, 435 U.S. 927 (1978); *United States* v. *Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1971) (concluding that spitting in the face of a USPS mail carrier, which led to a confrontation in which the defendant "knock[ed] him down, cutting his chin," is a "forcible assault, or, more exactly, a battery falling within the statutory description 'forcibly assaults, resists, opposes, impedes, intimidates, or interferes,'" 18 U.S.C. 111 (1970), because, "[a]lthough minor, it is an application of force to the body of the victim").

has as an element the use, attempted use, or threatened use of physical force against the person of another." H.R. 4768, 99th Cong., 2d Sess. (1986); see *Taylor*, 495 U.S. at 583.

At congressional hearings, both bills were criticized: the first as potentially too broad, the second as too narrow. *Taylor*, 495 U.S. at 584-586. A new bill emerged that defined the term violent felony to include a crime that:

> (i) has as an element the use, attempted use, or threatened use of force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. § 2(b) (1986).

H.R. 4885 was favorably reported by the House Committee on the Judiciary. In its report on the legislation, the Committee explained that the definition in Subsection (i) "would include such felonies involving physical force against a person such as murder, rape, assault, robbery, etc." H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). In its section-by-section analysis, the Committee again explained that the definition of the term "violent felony" in subsection (i) "adds all State and Federal felonies (imprisonment for a term exceeding one year) involving physical force against a person (e.g., murder, rape, assault, robbery, etc.)" as predicate offenses under the bill. *Id.* at 4. The provision that ultimately became law, H.R. 5484, 99th Cong., 2d Sess. § 1402(b) (1986), amended H.R. 4885 by adding to Subsection (ii) specific references to burglary, arson, extortion, and explosives offenses. *Taylor*, 495 U.S. at 587; see 18 U.S.C. 924(e)(2)(B)(ii)).

Thus, in the ACCA amendments, Congress patterned its definition of "violent felony" on the Section 16 definition, with two relevant modifications: (1) Congress limited the ACCA's coverage to felonies only, rather than reaching both felonies and misdemeanors; and (2) Congress focused primarily on crimes involving the use of force against persons, rather than property. Congress did not, however, alter the use-of-force language borrowed from Section 16(a) that had been understood to cover "threatened or attempted simple assault or battery on another person." *1983 Senate Report* 307 (footnotes omitted).

3. Petitioner argues (Br. 27-31) that remarks at the congressional hearings demonstrate that the Congress that enacted the ACCA did not intend to include battery, as traditionally defined, as a predicate offense. Petitioner is incorrect. While the congressional hearings point to certain concerns about the Section 16 definition of "crime of violence," those concerns appear to have been largely limited to the questions whether to include misdemeanors and property crimes.

Petitioner cites a number of comments emphasizing the importance of expanding the class of ACCA predicates beyond robbery and burglary, to offenses such as rape or murder. Br. 28-30. But he cites nothing to suggest that Congress intended to *limit* the ACCA's reach to rape and murder. Moreover, petitioner ignores evidence that legislators understood that even the narrower of the two legislative proposals would, at a minimum, cover the crime of "assault." See *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 2 (1986) (*House Hearing*) (statement of Rep. Hughes) ("Our bill would

add * * * felonies * * * against a person—that is, murder, rape, assault, robbery, et cetera—as predicate offenses under the enhanced penalty provisions.").

Petitioner also relies on comments concerning the importance of "prioritiz[ing] offenses" and avoiding including "garden variety local crimes" among the range of ACCA predicates. Br. 29 (brackets in original). But the comments to which he refers consist of a colloquy about what, if any, *property* crimes should be included among the predicate offenses. See *House Hearing* 11 (statement of Rep. Hughes) ("[G]iven the fact that we have got to be careful of our concept of federalism and prioritize, I wonder if you can just tell us, in your own words and generally, just why you would include as predicate offenses property crimes."); *id.* at 12 (statement of Rep. Wyden) ("I certainly share your view, Mr. Chairman, that it certainly shouldn't just be garden variety crimes against property. * * * I realize that in drafting we have got to be very careful to make sure that we don't open up a situation where just garden variety local crimes and property matters end up in the Federal courts."). Those comments do not, however, indicate that the two legislators regarded any crime involving the use of force against a *person*, such as battery, as either a low-priority or a "garden variety" crime.

Finally, petitioner relies on the testimony of Deputy Assistant Attorney General James Knapp for the proposition that the language of the Hughes bill, which would ultimately be enacted as Section 924(e)(2)(B)(i), "would not cover misdemeanors against a person like simple assault or battery." Br. 30 (quoting *House Hearing* 15). But the most natural reading of Knapp's statement is that he understood the bill to exclude "misdemeanors * * * like simple assault or battery" not because they

lack use-of-force elements, but rather because they are misdemeanors. And indeed, Knapp's testimony indicates that he understood that the Wyden bill, which contained largely the same use-of-force language, *would* cover assault and battery. The difference between the two, as Knapp explained, was that, while H.R. 4639 "would expand the coverage of the act to provide for Federal jurisdiction over career drug, and violent offenders, and perhaps prior misdemeanors and property crimes," *House Hearing* 15-16, H.R. 4768 would cover only "*felonies* involving the use of physical force against another person," and not "misdemeanors against a person" or "felonies directed only against a person's property," *id.* at 15 (emphasis added).

D. Petitioner's Reading Of Section 924(e)(2)(B)(i) Could Unnaturally Constrict The Scope Of Statutory Provisions Designed To Reach Misdemeanor, As Well As Felony, Crimes Of Violence

Petitioner's proposed interpretation of Section 924(e)(2)(B)(i) not only conflicts with the terms of that provision, but could undermine enforcement of other federal laws—particularly laws targeting domestic violence—in a way that Congress could not have intended.

1. As the reported cases demonstrate, the interpretive question presented in this case has arisen primarily in cases involving other federal "crime of violence" definitions. Federal firearms laws make it a crime to possess a firearm or ammunition following a conviction for a "misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9). Immigration law similarly makes a conviction for a "crime of domestic violence" a ground for deporta-

tion. 8 U.S.C. 1227(a)(2)(E).[10] The conflict of authority that petitioner asked this Court to resolve in his petition for a writ of certiorari largely concerns the meaning and application of those two provisions. See Pet. 18-21; *Hays*, 526 F.3d at 675 (interpreting the definition of "misdemeanor crime of domestic violence"); *Griffith*, 455 F.3d at 1340-1345 (same); *Belless*, 338 F.3d at 1065-1069 (same); *Nason*, 269 F.3d at 11-18 (same); *Smith*, 171 F.3d at 621 n.2 (8th Cir. 1999) (same); see also *Flores*, 350 F.3d at 668 (interpreting the definition of "crime of domestic violence").

Like Subsection (i) of the ACCA definition of "violent felony," both "misdemeanor crime[s] of domestic violence" and "crime[s] of domestic violence" are defined by reference to a use-of-force element. See 18 U.S.C. 921(a)(33)(A) (defining "misdemeanor crime of domestic violence," for purposes of Section 922(g)(9), as a misdemeanor offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person who has a specified domestic relationship with the victim); 8 U.S.C. 1227(a)(2)(E) (defining "crime of domestic violence" as a "crime of violence," as defined in 18 U.S.C. 16, "against a person [and] committed by" a person who has a domestic relationship with the victim).

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[10] Section 922(g)(9) and Section 1227(a)(2)(E) were enacted simultaneously, as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. See Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, § 104(f) [§ 658(b)], 110 Stat. 3009-372; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 350(a), 110 Stat. 3009-639.

The primary differences between those domestic-violence definitions and the definition of "violent felony" in the ACCA are: (1) the domestic-violence definitions explicitly reach misdemeanors, 18 U.S.C. 921(a)(33)(A); see also 18 U.S.C. 16(a), and (2) insofar as they reach misdemeanors, both provisions define predicate offenses *solely* by reference to whether they have, "as an element," "the use * * * of physical force," *ibid.*, and contain no residual provision similar to the ACCA's provision for crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 16(a), 924(e)(2)(B)(ii). The crime of battery is ordinarily punished as a misdemeanor. See, *e.g.*, *LaFave* § 7.14, at 299-300; see also, *e.g.*, Fla. Stat. §§ 775.082(4)(a), 784.03(1)(b) (2001).

2. This Court previously addressed the meaning of the definition of "misdemeanor crime of domestic violence" in *United States* v. *Hayes*, 129 S. Ct. 1079 (2009). In that case, the Court rejected the respondent's contention that a "misdemeanor crime of domestic violence" must have, as an element, a domestic relationship between the offender and the victim, citing both the plain language of the statute and the consequences of accepting the respondent's proposed interpretation. *Id.* at 1087.

The Court explained that Congress had enacted Section 922(g)(9) as a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), recognizing that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," but "are, at most, convicted of a misdemeanor." 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg). To construe Section 922(g)(9) to apply only to crimes that designate a domestic relationship as an ele-

ment of the offense, the Court reasoned, "would frustrate Congress' manifest purpose," since, when Section 922(g)(9) was enacted, "only about one-third of the States had criminal statutes that specifically proscribed *domestic* violence," and "[e]ven in those States, domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 129 S. Ct. at 1087. The Court considered it "highly improbable" that Congress intended for Section 922(g)(9) to become "'a dead letter' in some two-thirds of the States from the very moment of its enactment." *Id.* at 1087-1088 (citation omitted).

3. Similar considerations weigh heavily against petitioner's interpretation here. Much as in *Hayes*, petitioner's interpretation, if accepted and extended to Section 922(g)(9) and other similar provisions, could undermine enforcement of federal domestic-violence laws in much of the country.

As the Court noted in *Hayes*, most "domestic abusers were (and are) routinely prosecuted" for assault or battery. 129 S. Ct. at 1087. About half of the States today (as when Section 922(g)(9) was enacted) define the crimes of assault or battery according to the common-law rule: as including both the causation of bodily harm and intentional causation of offensive physical contact. See App. B, *infra*, 6a-11a; cf. *LaFave* § 7.15, at 301. Even among the minority of States that had enacted criminal statutes specifically targeting domestic violence when Section 922(g)(9) was enacted, many had incorporated a definition of assault or battery that followed the common-law rule.[11]

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[11] See Cal. Penal Code § 243(e)(1) (West 1997); Idaho Code § 18-918 (Supp. 1996); 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West Supp. 1996); Mich.

If, as petitioner posits, battery, as traditionally defined, does not have, as an element, "the use * * * of physical force against the person of another"—a phrase common to both the ACCA and the firearms disability provision—then it is possible that relatively few misdemeanor domestic violence convictions will qualify as "misdemeanor crime[s] of domestic violence" for purposes of the Section 922(g)(9) firearm possession ban. See *Hays*, 526 F.3d at 675, 681 (concluding for this reason that the defendant's misdemeanor conviction for assault and battery, based on domestic violence charges, did not qualify as a "misdemeanor crime of domestic violence"); *Belless*, 338 F.3d at 1065, 1067-1069 (similarly concluding that the defendant's misdemeanor conviction for assault and battery on his wife, based on charges that he "grabb[ed] her chest/neck area and push[ed] her against her car in an angry manner," did not qualify as a "misdemeanor crime of domestic violence"). Much the same is likely to be true of the domestic-violence provisions of immigration law. See *Flores*, 350 F.3d at 670, 672 (concluding that the alien's conviction for misdemeanor battery, based on his "attack[ing] and beat[ing] his wife" in violation of a no-contact order, did not qualify as a deportable "crime of domestic violence"under 8 U.S.C. 1227(a)(2)(E) and 18 U.S.C. 16(a)). It is highly unlikely that Congress intended that incongruous result. See *Hayes*, 129 S. Ct. at 1088-1089; see also *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301-2302 (2009) (rejecting an interpretation of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting that

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Comp. Laws Ann. § 750.81(2)-(3) (West Supp. 1996); N.M. Stat. Ann. § 30-3-15 (1994); Okla. Stat. Ann. tit. 21 § 644(C) (West Supp. 1997); Va. Code Ann. § 18.2-57.2 (Michie Supp. 1996); W. Va. Code Ann. § 61-2-28 (Michie Supp. 1996); cf. App. B, *infra*, 6a-11a.

"Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition").

1. Petitioner's interpretation of the statute would leave open the possibility that the government could prove that a criminal defendant was convicted of a crime that involves the use of "physical force" that is "violent," "aggressive," and "likely to cause a serious potential risk of physical injury," by relying on the modified categorical approach of *Shepard* and *Taylor*. Under that approach, the government could narrow a conviction under an assertedly overbroad battery statute by introducing charging documents, plea colloquies, or other comparable judicial records to establish that the defendant was, for example, convicted of "strik[ing]" and not "touch[ing]." See Pet. Br. 10; *Shepard* v. *United States*, 544 U.S. 13, 16 (2005); *Taylor*, 495 U.S. at 602.

But to rely on the modified categorical approach to determine whether battery is a "violent felony," a "misdemeanor crime of domestic violence," or a "crime of domestic violence," would effectively leave the proper classification of battery convictions to happenstance. In Florida, as elsewhere, charging documents generally track the language of the statute. See, *e.g.*, *Jomolla*, 990 So. 2d at 1237 (information charged the defendant, who had struck the victim with a cane and thereby caused injury, with "actually and intentionally touching or striking" the victim); *Jenkins* v. *State*, 884 So. 2d 1014, 1019-1020 (Fla. Dist. Ct. App. 2004) (Ervin, J., concurring and

dissenting) (information charged the defendant with "intentionally touching or striking" the defendant, where the defendant rammed his car into a police officer), abrogated on other grounds by *Heuras*, *supra*; *Cox* v. *State*, 530 So. 2d 464, 465 (Fla. Dist. Ct. App. 1988) (information alleged that the defendant "did actually and intentionally touch or strike [a police officer]," based on incident in which the defendant struggled with officers as they tried to arrest him, both striking and injuring them); see also *Clyatt*, 976 So. 2d at 1182-1183 (defendant "was charged by information with felony battery pursuant to section 784.03(2), Florida Statutes (2007), for touching or striking [the victim] against her will," based on an incident in which the defendant was observed "beating," "slapping," "punching," "grabbing," and "choking" the victim) (footnote omitted); cf. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself.").

Jury instructions, too, generally do not require jurors to draw distinctions between different quanta of physical force. See, *e.g.*, *Florida Standard Jury Instructions in Criminal Cases* 145 (visited Aug. 6, 2009) <http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejurryinstructions.pdf> ("To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt: * * * '[(Defendant) intentionally touched or struck (victim) against [his] [her] will.'") (brackets in original; emphasis omitted). And plea colloquies, which are not always transcribed or otherwise available, may reflect—as did the colloquy in this case, J.A. 61—only that the defendant pleaded guilty to the offense as charged in the information or indictment. There is, in short, little reason to think that the modified categorical approach would provide an effective response

to the formal categorical exclusion of battery, as traditionally defined, from the reach of federal "crime of violence" definitions.

E. The Florida Supreme Court's Decision In *Hearns* Does Not Control The Federal Definition

Finally, petitioner contends (Br. 34-43) that, in applying the ACCA's use-of-force language to a Florida battery, this Court is "bound" by the Florida Supreme Court's decision in *Hearns*, *supra*. That decision, however, did not define the elements of the state offense at issue in any way that conflicts with treating the Florida offense of felony battery as a "violent felony" under Section 924(e)(2)(B)(i).

1. In *Hearns*, the Florida Supreme Court considered whether battery on a law enforcement officer qualifies as a predicate for sentencing under Florida's violent career criminal statute, Fla. Stat. § 775.084(1)(d) (2000), which applies to defendants with at least three convictions for certain specified offenses, as well as for any "forcible felony." See *Hearns*, 961 So. 2d at 212-213. The term "forcible felony" is defined under state law as:

> treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

Fla. Stat. § 776.08 (2000).

Because battery on a law enforcement officer is not one of the enumerated offenses, the Florida Supreme Court considered whether it falls under the catch-all pro-

vision for felonies that "involve[] the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08 (2000); *Hearns*, 961 So. 2d at 215. The court held that it does not. The court explained that battery on a law enforcement officer incorporates the general definition of battery in Fla. Stat. § 784.03, as a crime that "may be committed with only nominal contact." *Hearns*, 961 So. 2d at 218-219. That crime, the court concluded, is not a "forcible felony" under Fla. Stat. § 776.08, for several reasons: (1) because, applying the canon of *ejusdem generis*, the "force" to which Section 776.08 refers should be interpreted as force "comparable to that of the enumerated felonies"; (2) because treating battery on a law enforcement officer as a "forcible felony" would create a disproportionate disparity in sentencing, since battery is ordinarily punishable only as a misdemeanor; and (3) because, applying the canon of *expressio unius est exclusio alterius*, the statute's explicit inclusion of "aggravated battery" and "sexual battery" suggested an intent to exclude other forms of battery. *Id.* at 219-220.

2. Petitioner contends (Br. 34-43) that, because this Court is "bound by a state court's construction of a state statute," *Wisconsin* v. *Mitchell*, 508 U.S. 476, 483 (1993), *Hearns* compels the conclusion that battery in violation of Fla. Stat. § 784.03 does not have a use-of-force element for purposes of the ACCA. 18 U.S.C. 924(e)(2)(B)(i). But insofar as the *Hearns* court interpreted the state statute at issue in this case—Fla. Stat. § 784.03, rather than Fla. Stat. § 776.08—the court merely confirmed that "any intentional touching against another person's will is battery even if insufficient to injure." J.A. 85 (citing *Hearns*, 961 So. 2d at 218-219). For all the reasons ex-

plained above, the offense, so understood, has a use-of-force element for purposes of federal law.

The aspect of *Hearns* on which petitioner relies is the Florida Supreme Court's construction of a *different* state statute, and one not at issue in this case: namely, the definition of "forcible felony" in Fla. Stat. § 776.08 (2000). That statute does, as petitioner notes (Br. 42), use language similar to Section 924(e)(2)(B)(i) in its catch-all provision for "any other felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08 (2006). But there is no reason to think that the two statutory phrases must have the same meaning.

In this case, the reasoning of *Hearns* makes particularly clear that the meaning of the word "force" in Fla. Stat. § 776.08 does not correspond to the meaning of the term "physical force" in Section 924(e)(2)(B)(i). The court in *Hearns* did not, as petitioner contends (Br. 40), base its conclusion on the "ordinary and natural meaning of physical force." The court instead based its construction on inferences from the specific wording of Florida's "forcible felony" definition, which enumerated a number of crimes, including "sexual battery" and "aggravated battery," but did not include simple battery among them. See *Hearns*, 961 So. 2d at 219 (invoking the *ejusdem generis* canon); *ibid.* (invoking the *expressio unius* canon). The court in *Hearns* also reasoned that, as a practical matter, the state-law definition of "forcible felony" should not cover an offense ordinarily punished as a misdemeanor. *Ibid.*

By contrast to the state law at issue in *Hearns*, the first prong of the ACCA contains no list of enumerated offenses. And, in marked contrast to the Florida law, the language in the ACCA's definition of "violent felony" in

Section 924(e)(2)(B)(i) is used, in another statute, *specifically* for the purpose of covering crimes that are punished as misdemeanors. See 18 U.S.C. 921(a)(33)(A) (defining "misdemeanor crime of domestic violence"); see also 18 U.S.C. 16(a) (defining felony and misdemeanor "crime[s] of violence"). *Hearns*, in short, provides neither binding nor persuasive authority for petitioner's restrictive reading of the phrase "has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i).

F. The Rule Of Lenity Does Not Apply

Petitioner (Br. 31-33) and his amicus (NACDL Br. 10-15) contend that the rule of lenity requires any remaining doubts about the meaning of Section 924(e)(2)(B)(i) to be resolved in favor of petitioner's restrictive reading of the term "physical force." "The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable." *Smith* v. *United States*, 508 U.S. 223, 239 (1993). Rather, the rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted); accord *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009) ("The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.") (quoting *Muscarello*, 524 U.S. at 138).

There is no such "grievous ambiguity" here. The statutory language, context, history, and purpose all confirm that battery, as defined by Florida law, qualifies as a

"violent felony" under Subsection (i) of the ACCA. Petitioner's invocation (Br. 33) of policies of "fair notice" are particularly out of place here. A person who is convicted of felony battery hardly need speculate as to whether that offense qualifies as a "violent felony" under the ACCA. That conclusion is not only consistent with "common sense," see *Flores*, 350 F.3d at 672 (Evans, J., concurring), but with the plain meaning of the statute as Congress wrote it.

G. Even If Felony Battery Did Not Qualify As A "Violent Felony" Under The First Clause Of The ACCA Definition, It Would Qualify Under The Residual Provision Of The Second Clause

For the reasons explained above, the court of appeals correctly concluded that petitioner's conviction for felony battery in violation of Florida law qualifies as a "violent felony" because it "has as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). That judgment should be affirmed.

The district court, however, concluded that the statute qualified as a "violent felony" under *both* Subsection (i) of the ACCA definition and the residual provision of Subsection (ii). J.A. 47, 49. And, although the court of appeals rested its decision solely on Subsection (i), J.A. 82, both parties also briefed the Subsection (ii) question in that court. See Pet. C.A. Br. 12-19; Gov't C.A. Br. 17-22.

Thus, if this Court were to accept petitioner's interpretation of Section 924(e)(2)(B)(i) and determine that felony battery lacks a use-of-force element under that provision, the proper course would be to vacate the judgment and remand to allow the court below to consider whether felony battery qualifies as a "violent felony"

under the ACCA's provision for a felony offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. Section 784.03, Florida Statutes (2001) provides:

Battery; felony battery—

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

2. Section 924 of Title 18, United States Code, provides in pertinent part:

Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, com-

mitted on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

3. Section 921 of Title 18, United States Code, provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,\committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as

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[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized.

a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim.

* * * * *

4. Section 16 of Title 18, United States Code, provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

5. Section 1227 of Title 8, United States Code, provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

* * * * *

(2) Criminal offenses

* * * * *

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

* * * * *

APPENDIX B

RELEVANT ASSAULT AND BATTERY LAWS

United States: 18 U.S.C. 113(a)(5) (setting out penalty for simple assault); *United States* v. *Delis*, 558 F.3d 177, 181-182 (2d Cir. 2009) (simple assault includes common-law battery); *id.* at 183 (citing cases).

Arizona: Ariz. Rev. Stat. Ann. § 13-1203(A) (West 2001) ("A person commits assault by," *inter alia*, "[k]nowingly touching another person with the intent to injure, insult or provoke such person.").

California: Cal. Penal Code § 242 (West 2008) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *People* v. *Pinholster*, 821 P.2d 571, 622 (Cal. 1992) ("[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.") (citation omitted).

District of Columbia: D.C. Code § 22-404(a) (2001) (setting out penalties for assault); *Ray* v. *United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("[A]n assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.").

Florida: Fla. Stat. § 784.03(1)(a) (2001) ("The offense of battery occurs when a person," *inter alia*, "[i]ntentionally touches or strikes another person against the will of the other.").

Georgia: Ga. Code Ann. § 16-5-23(a) (2007) ("A person commits the offense of simple battery when he or she," *inter alia*, "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another.").

Idaho: Idaho Code Ann. § 18-903 (2004) ("A battery is," *inter alia*, "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other.").

Illinois: 720 Ill. Comp. Stat. Ann. § 5/12-3(a) (West 2002) ("A person commits battery if he intentionally or knowingly without legal justification and by any means," *inter alia*, "makes physical contact of an insulting or provoking nature with an individual.").

Indiana: Ind. Code Ann. § 35-42-2-1(a) (LexisNexis Supp. 2007) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery.").

Iowa: Iowa Code Ann. § 708.1 (West 2003) ("A person commits an assault when, without justification, the person does," *inter alia*, "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.").

Kansas: Kan. Stat. Ann. § 21-3412(a) (2007) ("Battery is," *inter alia*, "intentionally causing physical contact with another person when done in a rude, insulting or angry manner.").

Louisiana: La. Rev. Stat. Ann. § 14:33 (West 2007) ("Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another."); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987) ("An essential element of battery is 'physical contact whether injurious or merely offensive.'").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (West 2006) ("A person is guilty of assault if * * * * [t]he person intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another person.").

Maryland: Md. Code Ann., Crim. Law § 3-203(a) (LexisNexis Supp. 2008) ("A person may not commit an assault."); *id.* § 3-201(b) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991) ("Battery * * * is the unlawful application of force to the person of another."); *Kellum* v. *State*, 162 A.2d 473, 476 (Md. 1960) ("It is well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery.").

Massachusetts: Mass. Gen. Laws Ann. ch. 265, § 13A(a) (West 2008) (setting out penalties for assault or assault and battery); *Commonwealth* v. *Campbell*, 226 N.E.2d 211, 218 (Mass. 1967) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight.").

Michigan: Mich. Comp. Laws Ann. § 750.81(1) (West 2004) (setting out penalties for assault or assault and battery) *People* v. *Nickens*, 685 N.W.2d 657, 661 (Mich. 2004) ("[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.") (internal quotation marks and citation omitted).

Missouri: Mo. Ann. Stat. § 565.070(1) (West 1999) ("A person commits the crime of assault in the third degree if," *inter alia*, "[t]he person knowingly causes physical

contact with another person knowing the other person will regard the contact as offensive or provocative.").

Montana: Mont. Code Ann. § 45-5-201(1)(c) (2007) ("A person commits the offense of assault if the person," *inter alia*, "purposely or knowingly makes physical contact of an insulting or provoking nature with any individual").

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-a(I) (West 2007) ("A person is guilty of simple assault if he," *inter alia*, "[p]urposely or knowingly causes bodily injury or unprivileged physical contact to another.").

New Mexico: N.M. Stat. § 30-3-4 (2004) ("Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.").

North Carolina: N.C. Gen. Stat. § 14-33(a) (2007) (setting out penalty for simple assault or simple assault and battery); *State* v. *West*, 554 S.E.2d 837, 840 (N.C. Ct. App. 2001) (battery is "the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion," and "may be proved by evidence of any unlawful touching of [a] person") (quoting *State* v. *Hefner*, 155 S.E. 879, 881 (N.C. 1930), and *State* v. *Sudderth*, 114 S.E. 828, 829 (N.C. 1922)).

Oklahoma: Okla. Stat. Ann. tit. 21, § 642 (West 2002) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) ("[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.").

Rhode Island: R.I. Gen. Laws § 11-5-3(a) (2002) (setting out penalty for assault or battery); *State* v. *Coningford*, 901 A.2d 623, 630 (R.I. 2006) (battery "refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another") (internal quotation marks and citation omitted.).

South Carolina: S.C. Code Ann. § 22-3-560(A) (West Supp. 2008) (setting out penalties for assault and battery); *State* v. *Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (per curiam) ("Assault and battery is defined as 'any touching of the person of an individual in a rude or angry manner, without justification.'") (citation omitted).

Tennessee: Tenn. Code Ann. § 39-13-101(a)(3) (2003) ("A person commits assault who," *inter alia*, "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative").

Texas: Tex. Penal Code Ann. § 22.01(a) (West Supp. 2008) ("A person commits [assault] if the person," *inter alia*, "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.").

Virginia: Va. Code Ann. § 18.2-57(A) (LexisNexis 2009) (setting out penalty for simple assault or assault and battery); *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927) ("A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.").

Washington: Wash. Rev. Code Ann. § 9A.36.011 *et seq.* (West 2009) (setting out penalties for assault);

State v. *Stevens*, 143 P.3d 817, 821 (Wash. 2006) (courts apply common-law definition of assault; that definition includes, *inter alia*, "an unlawful touching with criminal intent").

West Virginia: W. Va. Code Ann. § 61-2-9(c) (LexisNexis 2005) (defining battery as "unlawfully and intentionally mak[ing] physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally caus[ing] physical harm to another person").

Wyoming: Wyo. Stat. Ann. § 6-2-501(b) (LexisNexis 2007) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another."), amended by 2009 Wyo. Sess. Laws ch. 124; 2009 Wyo. Sess. Laws ch. 124 § 1 ("A person is guilty of unlawful contact if he: (i) Touches another person in a rude, insolent or angry manner without intentionally using sufficient force to cause bodily injury to another; or (ii) Recklessly causes bodily injury to another person.") (to be codified at Wyo. Stat. Ann. § 6-2-501(g)).

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IN THE

Supreme Court of the United States

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

BATTERY-BY-TOUCHING IS NOT A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT.

The issue here is whether Florida's offense of battery-by-touching is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) ("the physical force clause" or "clause (i)"), which requires the offense to have "as an element the use, attempted use, or threatened use of physical force against the person of another." Clause (i) defines one type of "violent felony" in the Armed Career Criminal Act ("ACCA"). In that context, the ordinary and natural meaning of "physical force" is force of a sort that is violent, aggressive, and likely to create a serious potential risk of physical injury. A battery that by statutory definition can be committed by an unwanted tap on the shoulder does not meet this definition.

The government nonetheless argues that clause (i) can be satisfied by the minimum amount of force which can exist. The government's argument fails to account for this Court's observation in *Taylor v. United States*, 495 U.S. 575, 588 (1990), that clause (i) applies only to "crimes actually involving violence against persons," fails to account for this Court's teachings in *Begay v. United States*, 128 S. Ct. 1581, 1586 (2008), that crimes committed in a "purposeful, violent, and aggressive manner" are "characteristic of the armed career criminal," and fails to account for the basic purposes of the statute: to distinguish violent felonies from less serious offenses and to punish harshly only those offenders convicted of violent felonies. The government's over-inclusive reading of clause (i) does more than just "blur the

distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). It "collaps[es] the distinction between violent and non-violent offenses[.]" *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003).

I. CLAUSE (i) OF THE "VIOLENT FELONY" DEFINITION REQUIRES VIOLENCE AND AGGRESSION LIKELY TO CREATE A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY.

A. The ordinary and natural meaning of "physical force" in the context of the ACCA requires violence and aggression likely to create a serious potential risk of physical injury.

1. The government acknowledges that physical force is "ordinarily" defined in terms of "actual violence." Respondent's Brief ("Resp. Br.") 13. It argues nonetheless that every intentional touching of another person qualifies as the use of physical force under clause (i) because touching involves "force" under the laws of physics – "even the slightest touch necessarily involves the use of some quantum of physical force."[1] Resp. Br. 16. The fundamental defect in this argument has been addressed by the well-reasoned majority of the circuits: physical force in a legal sense is not the same as force in a scientific, Newtonian sense. *See* Petitioner's Brief ("Pet. Br.") 18-22.

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[1] A "quantum" is defined in physics as the "minimum amount of a physical quantity which can exist." 12 *Oxford English Dictionary* 980 (2d ed. 1989).

Physical force in a statute defining "violent felony" means something more than the minimum amount of force which can exist in the scientific sense. In creating a category of violent felonies, Congress was not concerned with colliding quarks or tapped shoulders; it sought instead to punish aggressive, physical violence. The government's argument for the scientific definition fails to honor that distinction. As Judge Easterbrook explained:

> To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word "force" as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so.

Flores, 350 F.3d at 672.

The government's argument eliminates the distinction between the concepts of "physical force" and "physical contact," but gives no reason for collapsing the meaning of those distinct terms. *But see id.* Nor does the government mention that the term "physical contact" is found in other statutes, most notably *assault* statutes. *E.g.*, 18 U.S.C. § 111(a) (increasing penalty for assault "where such acts involve physical contact with the victim of that assault"); 18 U.S.C. § 115(b)(1)(B)(ii) (same). There would be no need for Congress to use the different terms if they had the same meaning. Had Congress intended to include as ACCA predicates all felonies that have as an element "physical contact" (or the threat or attempt of physical contact), it could have said just that. Conversely, had Congress intended that "physical force" include all physical contact, no matter how slight, there would have been no need to

use the term "physical contact" when § 111 was amended in 2008.

2. The government asserts that Mr. Johnson's argument "add[s] limiting words" in an "effort to rewrite the statute." Resp. Br. 9, 21; *see also* Resp. Br. 18, 25, 30. On the contrary, Mr. Johnson seeks only to give clause (i) its ordinary and natural meaning *in the context of the ACCA*. *Cf. Begay*, 128 S. Ct. at 1586-88 (interpreting the residual provision of clause (ii) of the "violent felony" definition to require "purposeful," "violent," and "aggressive" conduct). In this case, it is necessary to interpret clause (i) to ensure that the word "violent" is not read out of that clause of the "violent felony" definition. *See* Pet. Br. 22-27.

The government never acknowledges that "physical force" "must [be] read . . . in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.); *see also Leocal*, 543 U.S. at 11. The government would instead have this Court read the term "physical force" in isolation, without reference to the term being defined or the context in which it is used. This Court does not read statutes that way. When interpreting a statute, this Court considers not only the bare meaning of the critical word or phrase, but also its purpose and placement in the statutory scheme. *Holloway v. United States*, 526 U.S. 1, 6 (1999); *see also Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) ("statutes are not read as a collection of isolated phrases").

The purpose and placement of the physical force clause in the ACCA is crucial to understanding its meaning. The ACCA, which replaces the ten-year

statutory maximum for 18 U.S.C. § 922(g) offenses with a fifteen-year mandatory minimum, "focuses upon the special danger created when a particular type of offender – a violent criminal or drug trafficker – possesses a gun." *Begay*, 128 S. Ct. at 1587. The physical force clause is placed in the definitional portion of the ACCA. Its purpose there is to define "violent felony" and thus to ensure that the increased punishment reaches the intended offenders. Read in the context of the ACCA as a whole, then, the physical force clause is plainly intended to reach only those felonies that have as an element the use of physical force that is violent, aggressive and likely to create a serious potential risk of physical injury – as opposed to any felony that is committed by using force in the Newtonian physics sense, no matter how slight or non-violent that force is.

The purpose and placement of the physical force clause refute the government's claim that had Congress meant to include only violent crimes, it would have used the term "violent force" rather than physical force. Resp. Br. 18-19. Congress made its focus on violent crimes clear by choosing the term "violent felony" as the trigger for the enhanced punishment of the ACCA. That Congress did not define the term "violent felony" by merely repeating the word "violent" in the physical force clause is consistent with the age-old rule against using the term to be defined in the definition. *See* The National Archives, Federal Register, *Drafting Legal Documents*, No. 4[2] ("Do not include part or all of the term being defined in the text of your definition.");

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[2] *See* http://www.archives.gov/federal-register/write/legal-docs/definitions.html.

United States v. Bobadilla-Lopez, 954 F.2d 519, 525 n.3 (9th Cir. 1992) (Reinhardt, J., dissenting).

The government provides no explanation as to how a person convicted of a crime that can be committed by nothing more than spitting or an unwanted tap on the shoulder is "a violent criminal" more likely than other recidivists to deliberately use a gun. *See Begay*, 128 S. Ct. at 1587. The government's attempt to extend the term "physical force" to "the outer limits of its definitional possibilities" by construing it in isolation should be rejected as not in keeping with the plain meaning of that term in the context of the ACCA as a whole. *See Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006).

3. The government concedes that battery, under Florida law, does not *always* involve a risk of physical injury. *See* Resp. Br. 22, 23, 28. The government, however, attempts to fit non-injurious battery into clause (i) by arguing that the categorical approach and the definition of "violent felony" focus on the "ordinary" case and do not demand that every conceivable factual offense covered by the state battery statute present a serious risk of physical injury. Resp. Br. 25-30. Congress's use of the word "element" in clause (i) negates this argument.

Clause (i) requires that the "violent felony" have "as an element" the "use, attempted use, or threatened use of physical force." As the Department of Justice has recognized in the context of another statute containing the "as an element" language (18 U.S.C. § 921(a)(33)(A)), the application of such a statute "depends upon the 'element[s]' of the particular 'offense' of which the person was 'convicted.' That is, the prohibition turns on the *legal definition* of the predicate offense of conviction, not on the *actual conduct* that may have led to the conviction for that

offense." Office of Legal Counsel, U.S. Dept. of Justice, *When a Prior Conviction Qualifies As a "Misdemeanor Crime of Violence"* (May 17, 2007), 2007 WL 3125588, at *2. "This conclusion follows from a proper understanding of the key statutory term 'element.' Elements are the factual predicates of an offense that are specified by law and must be proved to secure a conviction." *Id.* (citing *Patterson v. New York*, 432 U.S. 197, 210 (1970); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Black's Law Dictionary* 538 (7th ed. 1999)). The categorical approach to clause (i) crimes, therefore, requires the use of physical force *in every conceivable case* before a conviction will qualify under that clause. *See, e.g.*, *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (*en banc*) ("If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element – implicit or explicit – of the crime."); *In re Sealed Case*, 548 F.3d 1085, 1091 (D.C. Cir. 2008) ("But by disputing only the *likelihood* – and not the *possibility* – that appellant pled guilty to a non-qualifying offense, the government essentially concedes the critical point. . . . After all, under *Shepard* [*v. United States*, 544 U.S. 13 (2005)], the question is not what appellant *probably* pled to, but what he *necessarily* pled to.").

The government's failure to acknowledge the element requirement of clause (i) is illustrated by its reliance on *Taylor v. United States*, 495 U.S. 575 (1990) (interpreting "burglary" in clause (ii) as requiring a generic definition of the crime), *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (ascribing a generic definition to "theft offense" under immigration laws), and *James v. United States*, 550 U.S. 192 (2007) (determining whether attempted

burglary fell within the residual provision of clause (ii)). Resp. Br. 26. Crucially, none of those cases interpreted clause (i) or any other statute requiring an offense to have "as an element" a given attribute. The government, in fact, cannot cite even one case that has taken its "ordinary case" approach to the element requirement in clause (i). By acknowledging that "a particular battery offense might not itself involve the use of potentially injurious force," Resp. Br. 28, the government concedes that battery-by-touching fails the "has as an element" test required for a prior conviction to qualify as a "violent felony" under clause (i).

4. The government admits that Congress intended the ACCA to reach crimes that "present a risk of injury" and that "[t]he concept of violence [is] embodied in the ACCA[.]" Resp. Br. 9, 21. Pointing to clause (ii), however, the government argues that the ACCA's concept of violence "is not limited to crimes that in themselves involve the use of potentially injurious physical force[,]" but includes "other crimes that create 'significant risks * * * of confrontation that might result in bodily injury.'" Resp. Br. 21 (quoting *James*, 550 U.S. at 199).

Although violence is, as the government observes, embodied in both clauses of the "violent felony" definition, the two clauses address different aspects and manifestations of violence. The government attempts to extend to a non-injurious touching the risk of injury present in clause (ii) crimes – the risk of confrontation that may lead to an escalation of violence. Resp. Br. 21-25. The plain reading of the statutory language and this Court's precedent establish that the potential risk of confrontation does not apply to clause (i).

The elements test of clause (i) focuses the violence inquiry solely on the conduct necessary to establish the elements of the offense. It asks whether those elements include physical violence. The elements test looks to the matters comprising the defendant's legal offense, and requires, as this Court observed in *Taylor*, that the offense be a crime "*actually involving violence* against persons." 495 U.S. at 588 (emphasis added). The violence must be an element of the offense; it must be present in every instance of the offense; it must be against a person; and it must be the defendant's act. By contrast, the confrontation/escalation risk test embodied in clause (ii) looks to see if violence is a possibility and allows the violence to be a result of the act of a person other than the defendant. *See, e.g., id.* (noting that Congress singled out burglary because it "often creates the possibility of a violent confrontation"); *James*, 550 U.S. 199-200, 203-07 (recognizing that violence may come as result of the act of a victim or third party). Because of these differences between clause (i) and clause (ii), the confrontation/escalation underlying cases such as *Taylor* and *James* cannot be imported into clause (i).

This Court recognized the difference that Congress intended for the two clauses. It observed that, while the risk of injury in clause (ii) crimes is not necessarily the result of the use of force by the defendant – because that is not an element in clause (ii) crimes as it is in clause (i) crimes[3] – the risk of

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[3] As the Taylor Court stated,

> Congress thought that certain general categories of property crimes – namely burglary, arson, extortion, and the use of explosives – so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute *even though, considered solely in terms of their statutory elements, they do*

injury in clause (ii) crimes can be the result of "the possibility of a violent confrontation." *Taylor*, 495 U.S. at 588. There is no textual or structural justification for extending this theory of the risk of injury (the possibility of confrontation) to clause (i) crimes because clause (i) crimes, unlike clause (ii) crimes, must contain the statutory element of the use or threat of force against the person of another. Clause (i) crimes are thus necessarily crimes that *in themselves* involve the use of potentially injurious physical force.

5. Pointing to the presumption that Congress acts intentionally when including language in one part of a statute while omitting it from another part, the government seeks to rebut Mr. Johnson's position that the physical force in clause (i) must be likely to present a serious potential risk of injury by arguing that "this Court should decline to superimpose the language of Subsection (ii) on the use-of-force language of Subsection (i), when Congress did not see fit to do so itself." Resp. Br. 19 (citing *Russello v. United States*, 464 U.S. 16 (1983)). But where, as here, there is a convincing alternative explanation for the difference in statutory language, the presumption carries little, if any, weight. *See, e.g.*, *Field v. Mans*, 516 U.S. 59, 67 (1995) ("Without more, the [negative] inference might be a helpful one. But [where] there is more . . . the negative pregnant argument should not be elevated to the level of interpretive trump card.").

When Congress created the current definition of "violent felony," it understood that the physical force

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not necessarily involve the use or threat of force against a person.

Id. at 597 (emphasis added).

clause would apply "to offenders who had actually been convicted of crimes of violence against persons." *Taylor*, 495 U.S. at 588. There was no doubt that these offenders' crimes would have involved conduct that presented "a serious potential risk of physical injury to another." *Cf. Begay*, 128 S. Ct. at 1585 ("A crime which has as an element the 'use, attempted use, or threatened use of physical force' against the person (as clause (i) specifies) is likely to create 'a serious potential risk of physical injury' and would seem to fall within the scope of clause (ii)."). There was thus no need to *explicitly* apply any limiting language to clause (i) – it was understood that those convicted under it would have committed crimes necessarily involving violence, which would necessarily involve conduct that presents a serious potential risk of physical injury to another.

When it came to clause (ii), however, there was a need for limiting language. "The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony." *Taylor*, 495 U.S. at 587. Congress did not intend that *all* frequently committed property crimes, crimes such as larceny and auto theft, count as predicate offenses for armed career criminal status. It only intended to include those property crimes with "inherent potential for harm to persons," *id.* at 588, and thus explicitly added the limiting language to clause (ii). *See* H.R. Rep. No. 99-849, at 3 (1986) (purpose of clause (ii) was to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person"). There is thus a convincing alternative explanation for the

difference in statutory language between the two clauses of § 924(e)(2)(B). *See Field*, 516 U.S. at 67-69.

Relying on the same presumption, the government argues that by expressly limiting the term "physical force" in 18 U.S.C. § 922(g)(8)(C)(ii) to that which "*would reasonably be expected to cause bodily injury*[,]" Congress's "fail[ure] to include a similar limitation in Subsection (i) of the ACCA suggests that no such limitation was intended." Resp. Br. 19-20. Convincing alternative explanations for the difference in the statutory language again overcome the government's attempt to rely on the negative pregnant inference. *See Field*, 516 U.S. at 67-69.

The amendment to the ACCA was enacted eight years before § 922(g)(8)(C)(ii), as part of a different act. Resp. Br. 20 n.7; *Russello*, 464 U.S. at 23 (applying the presumption to language in different sections "of the same Act"). The two acts also address different concerns. Specifically, clause (i) of the "violent felony" definition in the ACCA uses the term "physical force" to refer to the statutory elements of potential predicate crimes; § 922(g)(8)(C)(ii) uses the term to refer to actual conduct prohibited by a restraining order. A showing of irreparable harm is required for a restraining order. *See United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (noting that when Congress was enacting § 922(g)(8), it was "legislat[ing] against the background of the almost universal rule of American law that for a temporary injunction to issue: There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant . . . a strong threat of irreparable injury before trial is an adequate basis.") (internal quotation marks omitted). Congress could thus quite logically have incorporated that standard

into § 922(g)(8)(C)(ii) through use of the "reasonably be expected to cause bodily injury" language. The government has no counterpoint to this rational explanation of the choice of language in § 922(g)(8)(C)(ii), which was discussed in Mr. Johnson's initial brief. Pet. Br. 26.

Additionally, unlike "physical force" in the ACCA, that term in § 922(g)(8) is *not* part of a definition of a "violent felony." Section 922(g)(8) instead defines a class of persons who may not possess firearms – those subject to restraining orders that meet certain criteria – without *any* reference to "violence." Without such a limitation, the question – whether "physical force" in § 922(g)(8)(C)(ii) encompasses even the slightest touchings prohibited by Florida's battery statute – would be a closer one. But the qualification "reasonably be expected to cause bodily injury" accomplishes in § 922(g)(8)(C)(ii) what the word "violent" in the term "violent felony" accomplishes in § 924(e)(2)(B)(i): it limits "physical force" to that which creates a serious risk of injury. By the same token, adding an express injury limitation to § 924(e)(2)(B)(i) would serve little purpose, as the word "violent" already serves to limit "physical force" to that which is likely to create a serious potential risk of physical injury.

Given these alternative explanations, the presence of an express physical-injury limitation in § 922(g)(8)(C)(ii) does not support an inference that Congress intended for there to be no physical-injury limitation in the physical force clause.

6. Another significant flaw in the government's argument is its claim that "[t]he language of Section 924(e)(2)(B)(i) precisely tracks the general definition of the crime of battery." Resp. Br. 14. The government states that the general definition of

battery is "the unlawful application of force to the person of another." Resp. Br. 14 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15, at 301 (1st ed. 1986) ("LaFave")). The precise language of physical force clause, however, is that the offense must have as an element "the use, *attempted use, or threatened use* of physical force against the person of another." § 924(e)(2)(B)(i) (emphasis added).

The emphasized language points up a problem with the government's argument that occurs throughout its brief: it conveniently elides "the attempted use, or threatened use" language whenever it refers to the relevant statutory language. The elided language is critical. As little sense as it makes to speak of "touching" as constituting the use of physical force against the person of another in the context of a "violent felony" definition, it makes even less sense to speak of "attempting to touch" or "threatening to touch" in that same context. The government prefers the phrase "use of physical force" because that allows it to fashion an argument – however weak – that touching constitutes the use of physical force. The government makes no attempt to fashion an argument that "attempting to touch" or "threatening to touch" makes any sense in the context of the "violent felony" definition. As this Court has written, "when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9.

7. In any case, the government's discussion of the "general definition of battery," like its discussion of tort-law concepts of objectively offensive contacts, is a red herring. Resp. Br. 14-16, 27-28. The issue in the instant case is *not* whether the conduct for which Mr.

Johnson was convicted meets some "general" or tort-law battery definition. The issue is whether the slightest unwanted touch equates to the use, attempted use, or threatened use of physical force against the person of another as Congress used that phrase to define "violent felony" in the ACCA. The answer is that it does not.

B. Reading the physical force clause to require force that is violent, aggressive, and likely to create a serious potential risk of physical injury will not undermine other statutes.

1. Lacking sound legal bases for its arguments, the government turns to alarmist speculation that if battery-by-touching does not have as an element the actual, attempted, or threatened use of physical force, "then it is *possible* that relatively few misdemeanor domestic violence convictions will qualify as 'misdemeanor crime[s] of domestic violence' for purposes of the Section 922(g)(9) firearm possession ban," which "*could* undermine enforcement of federal domestic-violence laws in much of the country" contrary to the *likely* intent of Congress. Resp. Br. 37-41 (emphasis added). This speculation also lacks a legal and factual foundation.

Section 922(g)(9) prohibits a person convicted of a misdemeanor crime of domestic violence from possessing a firearm. A misdemeanor crime of domestic violence "has, as an element, the use or attempted use of physical force" and is committed by a person with a specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A).

Just as a felony battery committed by touching is not a "violent felony," a misdemeanor battery-by-touching is not a "crime of domestic violence" because

neither contains *as an element* the use of physical force. The plain language of both statutes, as supported by Congressional intent, establishes that the statutes were meant to reach crimes that are categorically "violent," not crimes that can be committed by an unwanted (or rude or insolent) touch such as a tap on the shoulder or the pushing away of a pointed finger. *See United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008) (observing that "in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch . . . does not entail 'use of physical force' in anything other than an exceedingly technical and scientific way. . . ."), quoted in Pet. Br. 20-21.

The Congressional Record reveals that the purpose of § 922(g)(9) was to prevent "people who engage in serious spousal or child abuse" from having guns; the persons targeted by the statute were "those who commit family *violence*," and "*violent* individuals." 142 Cong. Rec. S8831, S8832 (July 25, 1996) (emphasis added); S9419, S9420 (Aug. 1, 1996), S9458, S9459, S9628 (Aug. 2, 1996); S10377, S10378 (Sept. 12, 1996); S11226, S11227 (Sept. 25, 1996); S11363 (Sept. 26, 1996); S11877 (Sept. 30, 1996); *see also id.* at S9458 ("beat your wife, lose your gun; abuse your child, lose your gun"). A review of the entire Congressional Record reflects that the bill's sponsor, Senator Lautenberg, never used the words "touch," "contact," "offensive," "rude," and "insolent" to describe the kind of conduct that would disqualify a person from possessing a firearm. The ephemeral touching at issue when the offense of battery-by-touching is considered as a categorical matter was never the object of the Lautenberg Amendment.

2. In fiscal year 2008, only eighty-two people were convicted under § 922(g)(9), compared to the 6,000-plus persons sentenced for the unlawful receipt, possession, or transportation of firearms or ammunition or prohibited transactions involving firearms or ammunition. *See* Appendix A-1 (United States Sentencing Commission, *2008 Sourcebook of Federal Sentencing Statistics*, datafile, FY2008, Table 17, U.S.S.G. § 2K2.1); Appendix A-2 (USSC monitoring dataset for FY2008, listing defendants with convictions recorded as 18922G9 with the variable NWSTAT1-5). The Sentencing Commission does not provide data on how many, if any, of these convictions were based on battery-by-touching predicates, as opposed to battery-by-striking or battery-by-causing-bodily-injury. But the fact that only eighty-two people were convicted under § 922(g)(9) in 2008 undermines the government's prediction of severe repercussions if battery-by-touching is not found to be a crime of violence.

Likewise, the government claims that 6,000 individuals were convicted under Fla. Stat. § 784.03 in the 2007-08 fiscal year. Resp. Br. 29 n.8. This number does not reveal how many of those convictions were obtained under the "causes bodily harm" or "strikes" provisions of § 784.03, as opposed to the "touches" provision. Its only relevance lies in the fact that in 2008, only ten persons were convicted under § 922(g)(9) in the entire Eleventh Circuit, which holds that touching is physical force for purposes of § 922(g)(9). Appendix A-2; *see United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006). Interestingly, in 2008, the Fourth, Ninth, and Tenth Circuits, which hold that touching is *not* physical force, each had about the same number of convictions under § 922(g)(9) as the Eleventh Circuit,

and each had more § 922(g)(9) convictions than the First Circuit, which, like the Eleventh Circuit, holds that touching is physical force. *See* Appendix A-2; Pet. Br. 20-26.

3. The government admits that it "could prove that a criminal defendant was convicted of a crime that involves the use of 'physical force' that is 'violent,' 'aggressive,' and 'likely to cause a serious potential risk of physical injury,' by relying on the modified categorical approach of *Shepard* and *Taylor*." Resp. Br. 42. But the government asserts that the modified categorical approach is not effective because of the "happenstance" of state prosecutors' charging practices and the vagaries of state court record keeping practices. Resp. Br. 42-44. This same argument was made and rejected in *Shepard*. 495 U.S. at 22-23. As this Court explained:

> The Government's position . . . amounts to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State. But that limitation was the heart of the decision, and we cannot have *Taylor* and the Government's position both.
>
> There is not, however, any sufficient justification for upsetting precedent here. We are, after all, dealing with an issue of statutory interpretation, see, *e.g.*, *Taylor*, 495 U.S., at 602, 110 S.Ct. 2143, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning . . . .

Id. at 23.

4. The actual application of *Shepard* was demonstrated in *United States v. Robledo-Leyva*, 307 F. App'x 859 (5th Cir. 2009), where the court used the modified categorical approach to determine that appellant's prior Florida conviction for battery on a law enforcement officer was a "crime of violence." Noting that "the offense can be committed without the use or threatened use of physical force, *e.g.*, by touching," the court examined the charging document, which alleged that the battery was committed "by actually and intentionally touching or striking [the victim] against his will *by striking* [the victim] with an automobile." *Id.* at 862. Because appellant was "charged with only the act of striking the officer" and striking involves the use of force, the court concluded that "the offense as pared down under the modified categorical approach qualifies as a crime of violence." *Id.*

5. The government would have this Court believe that Mr. Johnson's construction of the physical force clause would exclude most batteries from the reach of federal "crime of violence" definition. *See, e.g.*, Resp. Br. 43-44. But by the government's own admission about half of the states limit battery to instances of physical injury. Resp. Br. 14. The government then selectively points to parts of statutes from the other states, Resp. Br. Appendix B, but neglects to mention that twenty-one of those statutes (including Florida's) have multiple sections, some of which can clearly be used to obtain convictions based on violent acts. *See* Reply Br. Appendix B (listing those statutes). And all jurisdictions have statutes that penalize "wife beaters" and "serious spousal abusers" who commit aggravated battery. LaFave, § 7.15(d), at 307.

Moreover, although the government briefly acknowledges that the Model Penal Code reflects the

modern approach of "limit[ing] battery to instances of physical injury" Resp. Br. 14 (citing LaFave § 7.15(a), at 302), the government ignores the import of the Code, as explained in LaFave. Model Penal Code § 211.1 covers only offenses causing "bodily injury," on the ground that "offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided" elsewhere in the Code. LaFave § 7.15(a) n.5, at 302 (quoting Model Penal Code § 211.1, Comment at 185 (1980)). LaFave explains:

> This is the prevailing view in those jurisdictions with new criminal codes, as reflected in the use of such statutory terms as "physical injury," "bodily injury," "bodily harm," "physical harm," "force or violence upon the person," or, occasionally, "serious bodily injury." A minority of these codes follow a much broader view, sometimes extending the crime to any touching or physical contact, but more often requiring that the contact be "offensive," "insulting or provoking," or done "in a rude, insolent, or angry manner."

LaFave § 7.15(a), at 302 (footnotes omitted).

The significance of the current national trend discussed in LaFave should not be lost. If, as the Model Penal Code states, "offensive touching is not sufficiently serious to be made criminal except in the case of sexual assaults as provided" elsewhere in the Code, then certainly *any touching* is not sufficiently serious to be made a predicate for a drastic ACCA enhancement.

C. The legislative history supports a finding that battery-by-touching is not a "violent felony."

"Because the language of Section 924(e)(2)(B)(i) is clear and consistent with its statutory context, there 'is no need for [the Court] to inquire beyond the plain language of the statute.'" Resp. Br. 31 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989)). Mr. Johnson agrees. As the preceding discussion establishes, the ordinary and natural meaning of the definition of "violent felony" contained in clause (i) of the ACCA requires violent, aggressive, injurious force. It is not necessary, therefore, to resort to the legislative history. In any event, that history supports Mr. Johnson's position that mere touchers are not violent felons within the meaning of the enhancement, and belies the government's position that Congress intended to use the enhancement as a dragnet to apply to all felons, violent or not.

The government points to the legislative history of 18 U.S.C. § 16(a), which referred to misdemeanor assault and battery. Resp. Br. 32-33. The government's reliance on this reference is misleading because battery has various definitions. *See* Appendix B; LaFave § 7.15. Congress did not explicitly define what type of battery it was referring to, but it was clear that it was referring to the category of offenses involving the "use, attempted use, or threatened use of physical force." It *never* mentioned battery-by-touching.

Although Congress employed the same use of physical force language in § 16(a) and clause (i) of the ACCA, the former allows for misdemeanors in its definition of crimes of violence, while the latter does not. This fact was emphasized during the

congressional hearings when Deputy Assistant Attorney General James Knapp testified on behalf of the United States Department of Justice that "[t]he bill would not cover misdemeanors against a person like *simple assault or battery* – that aspect we endorse. . . ." May 21, 1986 House Hearing[4] 15, 21 (emphasis added). This fact is important because the Florida battery statute at issue here is a simple battery statute. *See* Fla. Stat. § 784.03. Mr. Johnson was convicted of felony simple battery because of a prior misdemeanor simple battery conviction. The quantum of contact required for the conviction is the same for misdemeanor and felony simple battery – the slightest touch.

D. If any doubt remains, that doubt must be resolved in Mr. Johnson's favor.

The government asserts that "[a] person who is convicted of felony battery hardly need speculate as to whether that offense qualifies as a 'violent felony' under the ACCA." Resp. Br. 48. This assertion is wrong, as evidenced by the circuit split. *See* Pet. Br. 31-33. The Florida Supreme Court, moreover, has definitively stated that the Florida crime of battery-by-touching does not have as an element "the use or threat of physical force or violence against any individual." *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007). It is thus impossible to imagine how anyone who is convicted of battery-by-touching in Florida would have fair warning that said offense would necessarily involve the degree of "physical force" needed to be considered a "violent felony." *See*

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[4] Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, 2nd Session, on H.R. 4639 and H.R. 4768 (Armed Career Criminal Legislation), May 21, 1986, Serial No. 96.

United States v. Lanier, 520 U.S. 259, 265 (1997) (noting that the rule of lenity is part of the Due Process "fair warning requirement" under which a person may be prosecuted only after being given "'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'") (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see also* Brief of Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Petitioner 4-6

II. FEDERAL COURTS ARE BOUND BY THE FLORIDA SUPREME COURT'S DETERMINATION THAT BATTERY-BY-TOUCHING DOES NOT CONTAIN AS AN ELEMENT THE USE OR THREAT OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER.

The government does not dispute that a decision of a state's highest court construing the elements of a state crime is authoritative and binding on federal courts. *See* Resp. Br. 44-47. The Florida Supreme Court has, in *Hearns*, authoritatively decided that the element of "the use or threat of physical force or violence" against another person is not present in any felony battery conviction that may have been based on an unwanted touching, as proscribed by the misdemeanor battery statute. *Hearns*, 961 So. 2d at 218-19.

The government's discussion of *Hearns*, however, omits the actual holding of the Florida Supreme Court. That court applied a "statutory elements test" just like the one approved by this Court in *Taylor* and *Shepard* to determine if the crime of battery on a law enforcement officer contained as a necessary element the "use of physical force," that is, whether the use of physical force was always present in every way the

crime could be committed. *Id.* at 215 ("to be a forcible felony under section 776.08, the 'use or threat of physical force or violence' must be a *necessary element* of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony.").

Applying the statutory elements test, the Florida Supreme Court addressed various ways battery could be committed. "For example, tapping a law enforcement officer on the shoulder without consent would constitute a forcible felony. A child shooting a spitball at a school police officer would be guilty of a forcible felony." *Id.* at 219. The court's conclusion, and its actual holding, was that "such minor infractions are incompatible with the level of force the forcible felony statute contemplates." *Id.* The government's contention, Resp. Br. 46, that the decision in *Hearns* did not rest on the ordinary and natural meaning of physical force is simply wrong.

The government tries to assign other reasons for the holding in *Hearns*, but fails to note that those reasons are merely supportive of the actual holding. Resp. Br. 45; *see Hearns*, 961 So. 2d at 219 ("This reasoning is supported by the canon of statutory construction *ejusdem generis*"); *id.* ("We also note that simple battery is a misdemeanor offense"); *id.* ("We also note . . . the canon of statutory construction *expressio unius est exclusio alterius*"). The government thus never addresses the pertinent reasoning in *Hearns*, which is that a crime that can be committed by nominal "force" such as a tap on the shoulder or a spitball is simply not within the category of crimes that constitutes forcible (or violent) felonies.

Again trying to selectively parse a statute, the government claims that "the meaning of the word

'force' in Fla. Stat. § 776.08 does not correspond to the meaning of the term 'physical force' in Section 924(e)(2)(B)(i)." Resp. Br. 46. The Florida statute, however, does not merely use the word "force." Instead, in the same manner that the ACCA defines "violent felony," the Florida statute defines "forcible felony" as one that "involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08.[5] The government provides no explanation as to why the element of the "use or threat of physical force" found in § 776.08 should be construed any differently than the "use, attempted use, or threatened use of physical force" found in § 924(e)(2)(B)(i).

The government argues that *Hearns* is inapplicable because the Florida Supreme Court was construing its violent career criminal statute, not its battery statute. Resp. Br. 44-45. This, too, is incorrect. Just as the Court here is confronted with the issue of whether Mr. Johnson's prior battery conviction is a predicate for sentencing as an armed career criminal, the Florida Supreme Court was confronted with the issue of whether Mr. Hearns's prior battery conviction was a predicate for sentencing as a violent career criminal. Importantly, the Florida Supreme Court was, as this Court is now, faced with the issue of whether a conviction for battery in Florida always involves (has as an element) the use or threatened use of physical force against another person. The government has provided no reason for this Court to

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[5] The *Hearns* court explained that "involves" means the offense has to have the use or threat of physical force or violence as "a *necessary element* of the crime" to be considered a forcible felony. 961 So. 2d at 215. The government does not dispute that Florida applies the same elements test as the federal courts do when construing the physical force clause.

depart from the holding of the Florida Supreme Court that the offense of battery-by-touching does not contain as an element the use of physical force against another person.

III. REMAND IS NOT NECESSARY TO DETERMINE WHETHER MR. JOHNSON'S BATTERY-BY-TOUCHING CONVICTION QUALIFIES UNDER THE RESIDUAL PROVISION OF CLAUSE (ii).

The government asks in the alternative that the case be remanded for a determination of whether a violation of Florida's battery-by-touching statute qualifies as a violent felony under § 924(e)(2)(B)(ii). Resp. Br. 48-49. Such a remand is inappropriate for at least three reasons.

1. The Eleventh Circuit already addressed and disposed of the clause (ii) issue. As pointed out in Mr. Johnson's initial brief, the Eleventh Circuit agreed with Mr. Johnson that his prior conviction did not qualify as a violent felony under clause (ii). Pet. Br. 7. The court noted Mr. Johnson's argument that "felony battery under Florida law does not come within the definition of 'violent felony' that is contained in the ACCA, 18 U.S.C. § 924(e)(2)(B)." JA 82. After quoting clause (i), the court stated "[i]f battery under Florida law fits within that description, it is a violent crime for ACCA purposes; if not, then not." *Id.*

2. The government waived any right to raise a claim under clause (ii). The government did not seek clarification or rehearing of the Eleventh Circuit's decision. Nor did the government address clause (ii) in its brief in opposition to Mr. Johnson's certiorari petition.

3. A remand would also waste judicial resources. If this Court finds that by physical force Congress meant force of a violent sort, not the sort involved in a battery-by-touching, Mr. Johnson's battery conviction at issue herein would necessarily fail the clause (ii) test, which requires conduct that is purposeful, *violent*, and aggressive. *Begay*, 128 S. Ct. at 1586-87.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES SENTENCING COMMISSION
2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS

DATAFILE, FY2008, TABLE 17, U.S.S.G. § 2K2.1

Table 17

OFFENDERS SENTENCED FOR EACH CHAPTER TWO GUIDELINE[1]
Fiscal Year 2008

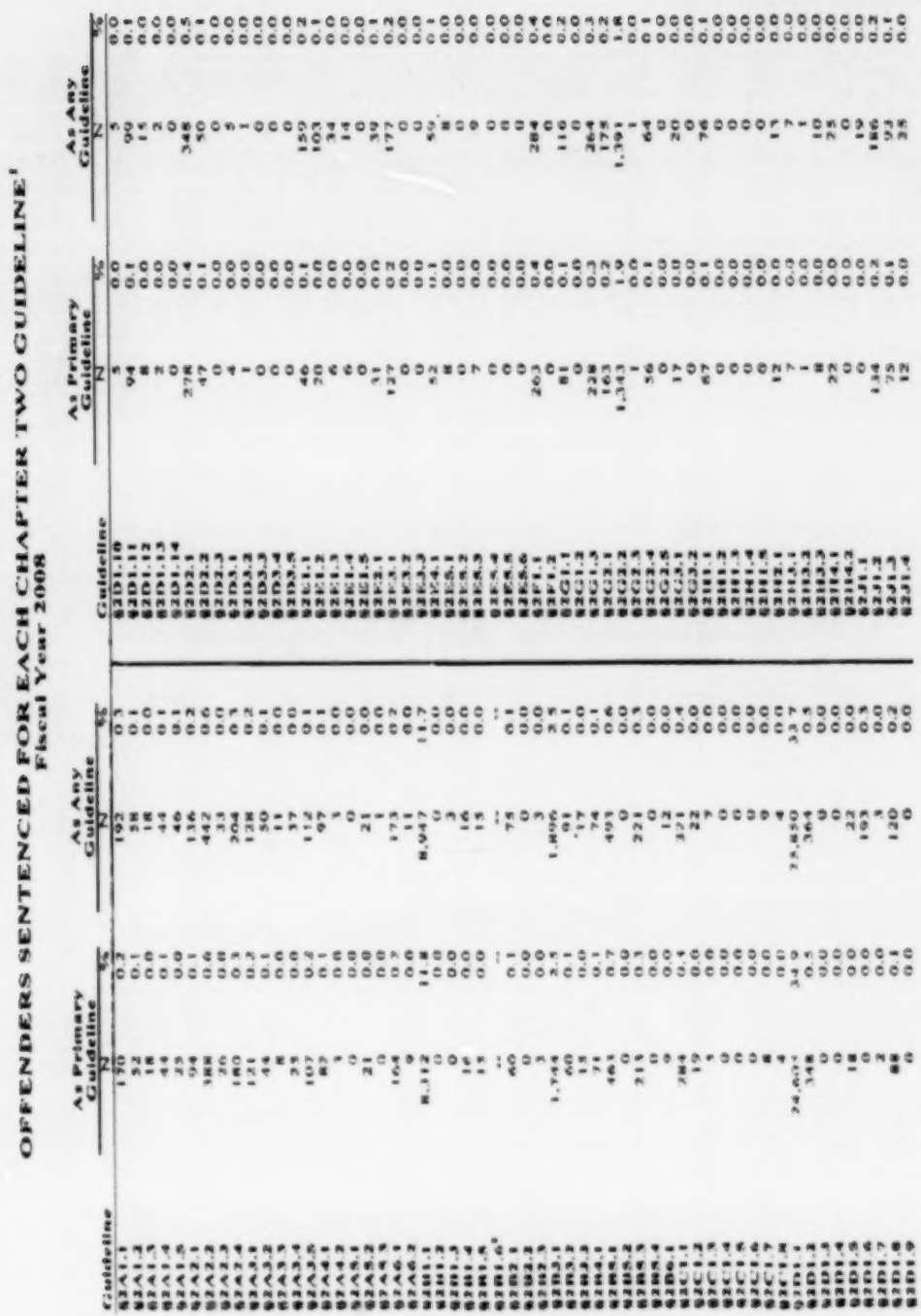

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Table 17 (cont.)

Guideline	As Primary Guideline N	As Primary Guideline %	As Any Guideline N	As Any Guideline %
§2J1.5	3	0.0	3	0.0
§2J1.6	60	0.1	67	0.1
§2J1.7	2	0.0	3	0.0
§2J1.8	0	0.0	0	0.0
§2J1.9	1	0.0	1	0.0
§2K1.1	8	0.0	8	0.0
§2K1.2	0	0.0	0	0.0
§2K1.3	37	0.1	43	0.1
§2K1.4	76	0.1	95	0.1
§2K1.5	13	0.0	13	0.0
§2K1.6	1	0.0	1	0.0
§2K1.7	0	0.0	0	0.0
§2K2.1	6,375	9.0	6,797	8.9
§2K2.2	0	0.0	0	0.0
§2K2.3	0	0.0	0	0.0
§2K2.4[2]	--	--	--	--
§2K2.5	19	0.0	20	0.0
§2K2.6	4	0.0	5	0.0
§2K3.1	0	0.0	0	0.0
§2K3.2	0	0.0	1	0.0
§2L1.1	3,536	5.0	3,590	4.7
§2L1.2	13,627	19.1	13,803	18.0
§2L1.3	0	0.0	0	0.0
§2L2.1	443	0.6	463	0.6
§2L2.2	1,777	2.4	1,782	2.3
§2L2.3	0	0.0	0	0.0
§2L2.4	0	0.0	0	0.0
§2L2.5	0	0.0	0	0.0
§2M1.1	0	0.0	0	0.0
§2M2.1	0	0.0	0	0.0
§2M2.2	0	0.0	0	0.0
§2M2.3	0	0.0	0	0.0
§2M2.4	0	0.0	0	0.0
§2M3.1	1	0.0	1	0.0
§2M3.2	2	0.0	2	0.0
§2M3.3	2	0.0	2	0.0
§2M3.4	0	0.0	0	0.0
§2M3.5	0	0.0	0	0.0
§2M3.6	0	0.0	0	0.0
§2M3.7	0	0.0	0	0.0
§2M3.8	0	0.0	0	0.0
§2M3.9	0	0.0	0	0.0
§2M4.1	0	0.0	0	0.0
§2M5.1	13	0.0	13	0.0
§2M5.2	46	0.1	48	0.1
§2M5.3	14	0.0	15	0.0
§2M6.1	5	0.0	6	0.0
§2M6.2	0	0.0	0	0.0
§2N1.1	2	0.0	2	0.0
§2N1.2	1	0.0	1	0.0
§2N1.3	4	0.0	4	0.0
§2N2.1	35	0.0	65	0.1
§2N3.1	0	0.0	1	0.0
§2P1.1	246	0.3	278	0.4
§2P1.2	90	0.1	103	0.1
§2P1.3	0	0.0	0	0.0
§2P1.4	0	0.0	0	0.0
§2Q1.1	0	0.0	0	0.0
§2Q1.2	48	0.1	50	0.1
§2Q1.3	32	0.0	33	0.0
§2Q1.4	0	0.0	0	0.0
§2Q1.5	0	0.0	0	0.0
§2Q1.6	0	0.0	0	0.0
§2Q2.1	114	0.2	120	0.2
§2Q2.2	0	0.0	0	0.0
§2R1.1	17	0.0	19	0.0
§2S1.1	1,026	1.5	1,082	1.4
§2S1.2	5	0.0	9	0.0
§2S1.3	222	0.3	241	0.3
§2S1.4	0	0.0	0	0.0
§2T1.1	500	0.7	608	0.8
§2T1.2	0	0.0	0	0.0
§2T1.3	0	0.0	0	0.0
§2T1.4	122	0.2	130	0.2
§2T1.5	0	0.0	0	0.0
§2T1.6	20	0.0	20	0.0
§2T1.7	0	0.0	0	0.0
§2T1.8	0	0.0	0	0.0
§2T1.9	29	0.0	40	0.1
§2T2.1	1	0.0	2	0.0
§2T2.2	0	0.0	0	0.0
§2T3.1	11	0.0	16	0.0
§2T3.2	0	0.0	0	0.0
§2T4.1	0	0.0	0	0.0
§2X1.1	29	0.0	1,693	2.2
§2X2.1	0	0.0	56	0.1
§2X3.1	125	0.2	143	0.2
§2X4.1	493	0.7	499	0.7
§2X5.1	0	0.0	19	0.0
§2X5.2	148	0.2	160	0.2
§2X6.1	1	0.0	1	0.0
§2X7.1	0	0.0	0	0.0
Total number of guidelines applied:				**76,669**
Number of cases with at least one guideline applied:				**70,511**

[1] Of the 76,478 cases, 5,967 were excluded due to missing guideline applied. The total for any guideline can exceed that for primary guideline because a case can have several guidelines applied, but only one primary guideline. Descriptions of variables used in this table are provided in Appendix A.

[2] In 904 cases the defendant was convicted of one or more counts of violating 18 U.S.C. § 1028A. By statute, the punishment for this crime must be served consecutively to any other punishment, therefore, in these 904 cases the conviction for this crime did not affect the guideline calculation for the underlying offense.

[3] In 2,495 cases the defendant was convicted of one or more counts of violating 18 U.S.C. § 924(c). By statute, the punishment for this crime must be served consecutively to any other punishment, therefore, in these 2,495 cases the conviction for this crime did not affect the guideline calculation for the underlying offense.

SOURCE: U.S. Sentencing Commission, 2008 Datafile, USSCFY08

APPENDIX A

UNITED STATES SENTENCING COMMISSION
MONITORING DATASET FOR FY2006

LISTING DEFENDANTS WITH CONVICTIONS RECORDED AS
18922G9 WITH THE VARIABLE NWSTAT1-5

MONCIRC

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid 1	6	7.3	7.	7.3
4	11	13.4	13.4	20.7
5	3	3.7	3.7	24.4
6	8	9.8	9.8	34.1
7	3	3.7	3.7	37.8
8	23	28.0	28.0	65.9
9	8	9.8	9.8	75.6
10	10	12.2	12.2	87.8
11	10	12.2	12.2	100.0
Total	82	100.0	100.0	

APPENDIX B

Arizona: Ariz. Rev. Stat. Ann. § 13-1203.A. "A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person . . . ."

Florida: Fla. Stat. Ann. § 784.03(1)(a). "The offense of battery occurs when a person . . . 2. Intentionally causes bodily harm to another person."

Georgia: Ga. Code Ann. § 16-5-23(a). "A person commits the offense of simple battery when he or she either: . . . (2) Intentionally causes physical harm to another."

Ga. Code Ann. § 16-5-23.1 "A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another."

Idaho: Idaho Code Ann. § 18-903. "A battery is any: . . . (c) Unlawfully and intentionally causing bodily harm to an individual."

Illinois: 720 Ill. Comp. Stat. Ann. 5/12-3. "Battery. (a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual . . . ."

Indiana: Ind. Code Ann. § 35-42-2-1.3(a). "A person who knowingly or intentionally touches an individual . . . that results in bodily injury to the

person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor."

Ind. Code Ann. §35-42-5-1(a). "A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is: (1) a Class A misdemeanor if: (A) it results in bodily injury to any other person . . . ."

Iowa: Iowa Code Ann. § 708.2.2. "A person who commits an assault, as defined in section 708.1, and who causes bodily injury or mental illness, is guilty of a serious misdemeanor."

Kansas: Kan. Stat. Ann. § 21-3412(a). "Battery is: (1) Intentionally or recklessly causing bodily harm to another person . . . ."

Maine: Me. Rev. Stat. Ann. title 17-A, § 207.1. "A person is guilty of assault if: A. The person intentionally, knowingly or recklessly causes bodily injury . . . to another person."

Maryland: Md. Code Ann. Crim. Law § 3-202(a). "Assault in the First Degree: (1) A person may not intentionally cause or attempt to cause serious physical injury to another."

Massachusetts: Mass. Gen. Laws. Ann. ch. 265 § 13A(b). "Whoever commits an assault or an assault and battery: (i) upon another and by such assault and battery causes bodily injury . . . ."

Michigan: Mich. Comp. Laws Ann. § 750.81a(1). "Except as otherwise provided in this section, a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year . . . ."

Missouri: Mo. Ann. Stat. § 565.070(1). "A person commits the crime of assault in the third degree if: (1) the person attempts to cause or recklessly causes physical injury to another person . . . ."

Montana: Mont. Code Ann. § 45-5-201(1). "A person commits the offense of assault if the person: . . . (a) purposely or knowingly causes bodily injury to another . . . ."

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-a. "A person is guilty of simple assault if he: (a) Purposely or knowingly causes bodily injury or unprivileged physical contact to another . . . ."

North Carolina: N.C. Gen. Stat. § 14-33(c). ". . . any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) inflicts serious injury upon another person . . . ."

N.C. Gen. Stat. § 14-33(d). "Any person who, in the course of an assault, assault and battery, or affray, inflicts serious injury upon another person, or

uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, is guilty of a Class A1 misdemeanor."

Oklahoma: Okla. Stat. Ann. title 21, § 641. "An assault is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another."

Tennessee: Tenn. Code Ann. § 39-13-101(a). "A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another . . . ."

Texas: Tex. Penal Code Ann. § 22.01(a). "A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse . . . ."

West Virginia: W. Va. Code Ann. § 61-2-9(c). "Battery. -- If any person unlawfully . . . unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor . . . ."

Wyoming: Wyo. Stat. Ann. § 6-2-501(b). "A person is guilty of battery if he . . . intentionally, knowingly or recklessly causes bodily injury to another."

AMICUS CURIAE BRIEF

130

(3)

No. 08-6925

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JUN 3 - 2009
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

SUMMARY OF ARGUMENT

The case presents the question whether the element of "physical force against the person of another," as set forth in the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), requires a showing of violent and aggressive conduct likely to create a serious potential risk of injury, or instead, as the court of appeals held, can be satisfied by any *de minimis* contact, such as a non-consensual

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

touching. The NACDL supports Petitioner's argument that the court of appeals' holding is contrary to the text and legislative history of the ACCA, this Court's precedents, and the better-reasoned decisions of other circuits. As Petitioner has demonstrated, for purposes of the definition of "violent felony" in the ACCA, the phrase "physical force" requires conduct that is violent, aggressive, and likely to create a serious potential risk of physical injury. Batteries that involve *de minimis* physical contact do not meet this standard.

In this *amicus curiae* brief, the NACDL offers a supplemental rationale for the adoption of Petitioner's construction of the physical force element of the ACCA: the rule of lenity. As this Court repeatedly has admonished, the rule of lenity is a time-honored rule of strict construction that requires the resolution of ambiguities in criminal statutes in favor of the defendant. This Court also has long recognized that application of the rule of lenity promotes the fair and equitable administration of the criminal justice system. The rule of lenity has special force here because the ACCA imposes a mandatory minimum sentence for violations of its prohibitions. Failure to apply the rule in circumstances like this one creates the risk that a defendant will serve a mandatory minimum sentence for conduct that Congress simply did not intend to reach.

In some recent cases, this Court has stated that the rule of lenity is triggered only in the event of a "grievous" statutory ambiguity. In other cases during this same period of time, however, the Court has not demanded such an elevated showing of ambiguity. Rather, it has indicated that the rule of lenity applies whenever the language of a statute does not clearly

and unambiguously support the Government's interpretation. The NACDL respectfully submits that this line of precedent conforms to the rule's origins as a principle of strict construction and better serves the rule's purpose of promoting fairness in the enforcement of the nation's criminal laws. Because the physical force element of the ACCA does not clearly and unambiguously apply to the conduct at issue here, the rule of lenity requires that the statute be construed in Petitioner's favor.

ARGUMENT

I. Under The Rule Of Lenity, Ambiguities In The Prohibitions And Penalties Imposed By Criminal Statutes Are Construed In Favor Of The Defendant To Foster Fairness And Uniformity In The Administration Of The Criminal Justice System.

In determining both the scope of a criminal statute and the penalties it authorizes, the rule of lenity demands resolution of ambiguities in favor of the defendant. *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). This "time-honored interpretive guideline" has long been central to the fair and consistent enforcement of the nation's criminal laws. *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (describing rule of lenity as a "venerable" principle of construction of criminal statutes); William Blackstone, *Commentaries on the*

Laws of England 88 (describing the rule as one of strict construction).[2]

A. Faithful Application Of The Rule Of Lenity Promotes Fairness And Uniformity In The Criminal Justice System.

This Court repeatedly has observed that the rule of lenity serves three fundamental goals in the administration of our criminal justice system: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts...." *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

In ensuring that the public is on notice of the meaning of a criminal statute, the rule of lenity "reflects the law's insistence that a criminal statute provide 'fair warning...of what the law intends to do if a certain line is passed.'" *Dean v. United States*, 129 S. Ct. 1849, 1860 (2009) (Breyer, J., dissenting)

---

[2] The rule of strict construction - now known as the rule of lenity - emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820). In *Wiltberger*, Chief Justice John Marshall, writing for the Court, rejected the government's expansive reading of a criminal statute and instead applied the rule of strict construction. The Court explained: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Id.* at 95.

(quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). Justice Holmes captured this core purpose of the rule of lenity when, more than half-a-century ago, he wrote: "To make the warning fair [in a criminal statute], so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The rule of lenity's requirement of intelligible demarcations in a criminal statute "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion); *see also Bass*, 404 U.S. at 348 (The rule of lenity reflects "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should") (internal quotations omitted).

Equally important is the rule of lenity's ability to prevent selective or arbitrary enforcement of criminal statutes. *Kozminski*, 487 U.S. at 952. The rule of lenity accomplishes this objective by "fostering uniformity in the interpretation of criminal statutes." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). In the same vein, the rule of lenity has the salutary effect of "generat[ing] greater objectivity and predictability" in the construction and application of criminal laws. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999).

As to the maintenance of the proper balance among legislatures, prosecutors, and courts, *Kozminski*, 487 U.S. at 952, the rule of lenity recognizes that, in our system of government, it is the province of the Congress, not the executive or the

judiciary, to define the contours of criminal activity. *Bass*, 404 U.S. at 348. If the legislature has not clearly and unambiguously expressed its intent that a criminal statute should reach certain conduct, then neither a prosecutor nor a court can fill that void and, on their own initiative, expand the statute's scope. *See Santos*, 128 S. Ct. at 2025 (rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

B. The Rule Of Lenity Has Special Force In Interpreting Criminal Statutes That Impose A Mandatory Minimum Sentence.

The rule of lenity has the same force in construing a statute that increases the punishment for specified conduct as it does in construing whether the statute reaches that conduct in the first place. That is, the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387; *see also Bell v. United States*, 349 U.S. 81, 83 (1955) (rule of lenity "resolve[s] doubts in the enforcement of a penal code against the imposition of a harsher punishment"); *Ladner v. United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to ambiguities in a statute that would "increase the penalty...place[d] on an individual").

Accordingly, the rule of lenity plays a special role in interpreting statutes, like the ACCA, that impose mandatory minimum sentences. In the Sentencing Reform Act of 1984, Congress instructed courts to

impose a sentence that is "not greater than necessary," 18 U.S.C. § 3553(a) – unless "otherwise specifically provided," *id.*, § 3551(a), and to consider the particular factual circumstances of an individual case to better tailor a defendant's sentence. *Id.*, § 3553(a). These commands are consistent with the longstanding federal sentencing practice of considering "every convicted person as an individual and every case as [] unique." *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (internal quotations omitted). Statutes imposing mandatory minimum sentences are an exception to these normal sentencing rules. *See Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion...."). Thus, an overly-broad interpretation of a statute imposing mandatory minimum sentences may trammel on Congress' general policy favoring individualized sentencing. As Justice Breyer recently pointed out, "where a mandatory minimum sentence is at issue, [the rule of lenity's] application...will likely produce an interpretation that hews more closely to Congress' sentencing intent." *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting). In particular, if a trial court construes the statute expansively so that additional penalties are imposed, it runs the risk of ensnaring in the statute "individuals whom Congress would not have intended to punish so harshly." *Id.* at 1861. The rule of lenity limits this risk by requiring that ambiguities in statutes that impose mandatory minimum sentences be resolved in the defendant's favor. *Id.*

C. In Keeping With Its Origins And Purpose, The Rule Of Lenity Should Apply To All Ambiguous Criminal Statutes, Not Just Those That Are Grievously Ambiguous.

Over the past two decades, this Court has not been consistent in describing the degree of ambiguity that must be present in a statute before the rule of lenity is triggered. In some cases, the Court has said that "grievous ambiguity or uncertainty in the statute" is required for the rule of lenity to apply. *Dean*, 129 S. Ct. at 1849 (internal quotations omitted); *see also Muscarello v. United States*, 524 U.S. 125, 139 (1998); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Chapman v. United States*, 500 U.S. 453, 463 (1991). In a slew of other cases, however, the Court has not required such an elevated showing. Instead, it has applied the rule of lenity simply upon concluding that the statute was ambiguous, without suggesting that the ambiguity need rise to the level of "grievous." *See Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (rule of lenity should be applied when there is "any ambiguity" or if there are "two rational readings" of a criminal statute); *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct–we apply the rule of lenity and resolve the ambiguity in [defendant's] favor."); *see also Santos*, 128 S. Ct. at 2025 (applying rule without noting the criminal statute satisfied any heightened degree of ambiguity); *United States v. R.L.C.*, 503 U.S. at 305 (same). In short, there now are two conflicting lines

of rule-of-lenity precedent: one that confines the rule's application to exceptional ambiguities and another that applies the rule to standard ambiguities.

As scholars have explained, the second line of precedent, under which the rule of lenity comes into play when the statute does not clearly and unambiguously support the government's harsher reading, better captures the origins and purposes of the rule. *See* Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2424-25 (2006) (noting criticism of "grievous ambiguity" standard); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 922 (2004) ("For lenity to serve its purpose of enhancing criminal law's democratic responsiveness, the rule must be given more teeth...."); Bryan Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 Loy. U. Chi. L.J. 639, 668 (2000) ("Instead of waiting until the end of the interpretive process to invoke the rule of lenity, however, courts should use the rule of lenity as both part of the textualist interpretive process and as a general principle of strict construction of criminal statutes."). Like other attempts to truncate the rule of lenity, the concept of "grievous ambiguity" threatens to uproot the rule from its rightful place as a "presupposition of our law [and] reduce [it] to a historical curiosity." *Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting).

The simple ambiguity standard respects the rule of lenity's position as a presupposition of our law. Under that standard, the rule forms a critical "background principle" against which criminal statutes must be interpreted. *United States v. X-*

Citement Video, Inc., 513 U.S. 64, 71 (1994). Like other tools of statutory construction, the rule of lenity seeks to honor legislative intent. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler*, 537 U.S. at 404 n.8; *Crandon*, 494 U.S. at 158; *Ladner*, 358 U.S. at 178. If that intent is not clearly and unambiguously expressed, then under the principle of strict construction on which the rule of lenity is predicated, the rule resolves the ambiguity by mandating that "the tie must go to the defendant." *Santos*, 128 S. Ct. at 2025.

II. The Rule Of Lenity Precludes Application Of The Physical Force Element Of The ACCA To The Conduct At Issue In This Case.

Ultimately, no matter the degree of ambiguity required, the rule of lenity precludes application of the "physical force" element of the ACCA to the conduct at issue in this case.

The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). It is undisputed that subsection (ii) is inapplicable here. The critical issue thus is the meaning of the phrase "physical force" in subsection (i): specifically, does it demand that the

force be violent in nature or does any *de minimis* force come within the ambit of the provision? As Petitioner demonstrates, the ordinary meaning of the statutory language, read in context and in light of the ACCA's legislative history, plainly contemplates that "physical force" will be limited to acts of violence and aggression creating a serious risk of physical injury. But at a minimum, subsection (i) does not clearly and unambiguously support the Government's construction. Accordingly, the rule of lenity prohibits application of ACCA's mandatory minimum sentence to Petitioner.

Florida's battery statute requires proof that the defendant "actually and intentionally touches or strikes another person against the will of the other." Fla. Stat. § 784.03(1)(a).[3] As construed by Florida courts, mere intentional touching, "no matter how slight," is sufficient to constitute battery. *State v. Hearns*, 961 So.2d 211, 218-19 (Fla. 2007). Thus, tapping another person without permission or shooting a spitball at another person constitutes battery in Florida. *Id.* at 219.

As Petitioner has shown, it is, at best, ambiguous whether Congress intended for the ACCA to encompass conduct like tapping or spitballs within the statute's definition of violent felony. This Court's recent decision in *Begay v. Unites States*, 128 S. Ct. 1581 (2008), is instructive. In that case, the Court addressed whether the crime of driving while under

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[3] The crime of battery is normally a misdemeanor in Florida, but became a felony here because of Petitioner's prior battery conviction. *See* Fla. Stat. § 784.03(1)(a), (2).

the influence of alcohol fell within subsection (ii)'s residual clause, which applies to circumstances that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* at 1582. In construing the residual clause, the Court in *Begay* looked for guidance to subsection (i)–the provision of the ACCA at issue in this case, which, as indicated above, applies to "the use, attempted use, or threatened use of physical force against the person of another." The Court stated that subsection (i) applies to conduct that is "likely to create 'a serious potential risk of physical injury.'" *Id.* at 1585. Because batteries in the form of mere touching and spitballs are not likely to cause physical injury, the element of "physical force," as construed by this Court in *Begay*, would not cover such batteries. That the Court in *Begay* posited such a construction of the physical force element of the ACCA suggests that the statute is at least sufficiently ambiguous to trigger application of the rule of lenity.

The legislative history of the ACCA also supports Petitioner's interpretation of the statute and, hence, the application of the rule of lenity. This history indicates that Congress did not intend for the ACCA to reach crimes that fail to pose a serious threat of injury. As one circuit described it:

> The legislative history of the amendment supports the conclusion that Congress was primarily concerned with broadening the scope of the provision to encompass truly serious crimes. We conclude that when Congress amended the enhancement provision to cover all violent felonies that have "as an element the use, attempted use, or threatened use of physical force against

> the person of another," 18 U.S.C. § 924(e)(2)(B)(i) (1988), it did not intend to include felonies in which the use of force was *de minimis*....

United States v. Mathis, 963 F.2d 399, 407 (D.C. Cir. 1992). On this reasoning, because it is possible to commit felony battery in Florida with *de minimis* force, the ACCA could not possibly cover every felony battery under Florida law.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court addressed parallel language in another statute, 18 U.S.C. § 16, which, like the ACCA, has a physical force clause.[4] The issue in *Leocal* was whether Florida's crime of driving under the influence of alcohol and causing serious bodily injury was a "crime of violence" under § 16. *Leocal*, 543 U.S. at 3-4. The Court held that it was not. It explained:

> [W]e cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes....

Id. at 11. *Leocal* thus buttresses Petitioner's argument that the physical force element of the

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[4] 18 U.S.C. § 16 provides:

> The term "crime of violence" means--
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or....

ACCA requires violent contact. At a minimum, it shows that the rule of lenity precludes the ACCA's application here, where only *de minimis* touching is necessary for conviction.

It is also significant for purposes of the rule of lenity that, all told, five circuit courts have interpreted the element of "physical force" in ACCA and other similar statutes to require the force to be violent or destructive in nature. *See Mathis*, 963 F.2d at 407 ("We conclude that when Congress amended the [ACCA] to cover all violent felonies..., it did not intend to include felonies in which the use of force was *de minimis*...."); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (requiring in context of 18 U.S.C. § 16, the physical force to be violent or destructive); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (requiring, in the context of 18 U.S.C. § 16, the force "to be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1018 (9th Cir. 2006) (requiring physical force be violent and active in context of § 16); *United States v. Hays*, 526 F.3d 674, 677, 681 (10th Cir. 2008) ("[T]he Supreme Court and both this circuit and others have suggested that 'physical force' means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute 'physical force'"; holding that the Wyoming battery statute did not require physical force and thus was not a crime of domestic violence under 18 U.S.C § 922(g)(9)). The court of appeals decision in this case is the minority – and, we submit incorrect – view. While not dispositive, *Reno v. Koray*, 515 U.S. 50, 64-65 (1995), the circuit split itself suggests that the physical force

element of the ACCA is ambiguous when applied to the conduct at issue here.

Finally, invocation of the rule of lenity here would help avoid the pernicious consequences of an overly expansive application of a severe mandatory minimum sentence, in lieu of an alternative reading of the statute that would result in a more limited sentence. Based on its view that Petitioner qualified for enhancement under ACCA, the district court sentenced Petitioner to 185 months' imprisonment – a sentence that, while near the bottom of the statutory range, was far greater that Petitioner would have faced without the enhancement. Had Petitioner not been treated as an "armed career criminal," he would have been subject to 18 U.S.C. § 922(g)'s unenhanced statutory maximum of ten years, 18 U.S.C. § 924(a)(2), and his advisory guideline imprisonment range would likely have been between twenty-seven to thirty-three months. *See* Petitioner's Brief at pp. 6-7. Before the district court chose the harsher alternative, it was required to ensure that, in keeping with the rule of lenity, Congress spoke in "language that is clear and definite." *Jones v. United States*, 529 U.S. 848, 858 (2000) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). The district court failed to conduct the inquiry that the rule of lenity requires. That inquiry reveals that Petitioner is serving a harsher sentence in the face of the patent statutory ambiguity as to whether the ACCA's definition of "violent felony" was meant to include all felony battery convictions, even those based on *de minimis* physical contact. Application of the rule of lenity here thus would rectify that arbitrary and severe sentencing result.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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